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IN THE

Supreme Court of the United States

THE CHASE MANHATTAN BANK, ELIZABETH B. PARRY and HARRISON F. DURAND, as Trustees of a Trust under the Will of Sidney L. Parry, Deceased, for the Benefit of Elizabeth B. Parry *et al.*;

THE CHASE MANHATTAN BANK and DR. BERNARD L. PACELLA, as Trustees of a Trust under the Will of John Dallett, Deceased, for the Benefit of John Dallett, Jr.;

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under the Will of Elvira R. Evens, Deceased, for the Benefit of Grace Evens Stewart;

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under the Will of James N. Worcester, Deceased, for the Benefit of James N. Worcester, Jr.; and

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under Agreement dated March 16, 1955 by Charles Anderson Dana for the Benefit of Sandra Leigh Dana Adolfsson,

Petitioners,

v.

GENE GAVIN, Commissioner of Revenue Services of the State of Connecticut,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Connecticut Supreme Court erred in holding that *Safe Deposit & Trust Co.* v. *Virginia*, 280 U.S. 83 (1929), is no longer good law.

2. Whether the United States Constitution forbids a state from taxing undistributed income earned by a trust created by an income tax resident of the state when the trust assets, trustee, and administration have long been located outside the state and all income subject to taxation is derived from sources outside the state, a question as to which numerous state courts are in conflict.

3. Whether Connecticut's tax on the undistributed income of "resident" trusts violates the Commerce Clause because it does not allow a credit for taxes paid on the same income to other states and because the tax has the purpose and effect of encouraging Connecticut residents to prefer Connecticut banks as trustees over trustees from other states.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties who appeared in the Supreme Court of Connecticut. One hundred percent of the stock of The Chase Manhattan Bank is owned by one parent corporation, The Chase Manhattan Corporation, which is a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 249 Conn. 172 (1999). Pet. App. 1a. The opinion of the Superior Court, Tax Session, of the State of Connecticut is unreported. Pet. App. 78a.

JURISDICTION

The judgment and opinion of the Supreme Court of the State of Connecticut was officially reported on June 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. CONST. amend. XIV, § 1, provides: "No state shall * * * deprive any person of life, liberty, or property, without due process of law."

The Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, provides: "The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Relevant portions of Connecticut statutes, regulations and rules are set forth at Pet. App. 98a-101a.

STATEMENT OF THE CASE

A. The Taxation System At Issue.

This case presents a constitutional challenge to the application of Connecticut's 4.5% annual tax on undistributed income earned by "resident trusts." That term is defined by Connecticut to include all testamentary trusts created under the wills of decedents who were "residents" of the State at the time of death, and all inter vivos trusts created by individuals who were "residents" of the State in the year in which the trust was created or became irrevocable.[1] An individual was a "resident" for purposes of those provisions if he or she was a domiciliary of Connecticut or a nondomiciliary who maintained a permanent place of abode in Connecticut and spent more than 183 days of the taxable year there.[2] Thus, even trusts that had no contemporaneous contacts with Connecticut in 1993 were subject to Connecticut's income tax if the testator or donor had been an income tax resident of Connecticut.

Connecticut taxes all of the undistributed income of resident testamentary trusts. Resident inter vivos trusts are taxed based on the proportion of "noncontingent beneficiaries" resident in Connecticut to all "noncontingent beneficiaries."[3] Thus an inter vivos trust with two Con-

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[1] *See* CONN. GEN. STAT. ANN. § 12-701(a)(4)(C) and (D)(ii), (iii) (1993); Pet. App. 98a-99a.

[2] *See* CONN. GEN. STAT. ANN. § 12-701(a)(1); Pet. App. 98a. Domiciliaries are excepted from "resident" status if they do not maintain a permanent place of abode in the State, maintain a permanent place of abode elsewhere, and spend no more than 30 days of the taxable year in Connecticut. *Id.* § 12-701(a)(1)(B); Pet. App. 98a.

[3] *See* CONN. GEN. STAT. ANN. § 12-701(a)(4)(D); Pet. App. 98a-99a. For a definition of the term "noncontingent beneficiary," see CONN. AGENCIES REGS. § 12-701(a)(9)-1(b)(3) (1994); Pet. App. 100a-101a.

necticut noncontingent beneficiaries and one New York noncontingent beneficiary would pay tax to Connecticut on two-thirds of the trust's undistributed income.

As the trial court pointed out below, the current version of the Connecticut tax was passed in response to the concerns of Connecticut banks facing competition for trust business from out-of-state banks. Pet. App. 94a. The State's predecessor tax scheme effectively taxed "only trusts administered by Connecticut trustees," (Pet. App. 94a): it exempted "resident" trusts from taxation if all of the trustees were nonresidents, the trust assets were located without the state, and "all income and gains of the trust [were] derived from or connected with sources without this state."[4] But "Connecticut banks fearing the loss of trust business lobbied for the current law," (Pet. App. 94a),[5] and the legislature complied by repealing the exemption so as to tax the income on all resident trusts regardless of the location of trustees (and trust administration), and trust corpus, and income production.[6]

The Connecticut statute does not allow for a tax credit to be taken against other states' taxes on the only kind of income earned by the trusts involved here, namely income derived from intangible personalty such as dividends, interest, and capital gains from the sale of securities.[7] The statute does allow credit for other state taxes on trust income derived from real or tangible personal property or

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[4] S.B. 2010, § 52(a)(4), June 5 Spec. Sess. (Conn. 1991), 1991 Conn. Legis. Serv. (West).

[5] *See also* S-341, 1st Spec. Sess. 35, Part 13 (Conn. 1992); H-636, 1st Spec. Sess. 35, Part 24 (Conn. 1992); Nancy E. Blair, *Equal Footing for Local Fiduciaries*, CONN. L. TRIB., Dec. 27, 1993, at 21.

[6] *See* 1992 Conn. Pub. Act 92-17, § 11, 1992 Conn. Acts 1269, 1277 (Spec. Sess. (codified as amended at CONN. GEN. STAT. § 12-701(a)(4) (West 1993 & Supp. 1996))).

[7] *See* CONN. GEN. STAT. § 12-704; Pet. App. 39a.

from a business, trade, occupation or profession located in the foreign state. Pet. App. 39a n.26.

B. The Parties.

Petitioner The Chase Manhattan Bank, a banking corporation incorporated under the laws of the State of New York, is a trustee of the five trusts (four testamentary and one inter vivos) subject to the Connecticut income tax in this case. Petitioners Parry and Durand are co-trustees of one of the testamentary trusts, and petitioner Pacella is a co-trustee of another of the testamentary trusts. The individual petitioners (the "Trustees") all reside outside the State of Connecticut.

The courts below rendered their decisions on the basis of the following facts, which were stipulated to by the parties, (Pet. App. 49a):

- all four of the testamentary trusts were created by individuals who were residents and domiciliaries of Connecticut at the time of their respective deaths, and the inter vivos trust was created by an individual who was a resident and domiciliary of Connecticut at the time the inter vivos trust was created and became irrevocable;
- none of the Trustees, acting as trustee, was domiciled or resident in Connecticut in 1993 or any of the previous twenty years;
- no asset of any trust was located or situated in Connecticut in 1993 or any of the previous thirteen years;
- no aspect of the administration of any trust was conducted in Connecticut in 1993 or any of the previous thirteen years;
- no income of any trust in 1993 was in any manner "connected with or derived from" sources within Connecticut;

- the four testimentary trusts were created under four separate wills, each of which was admitted to probate by a Connecticut probate court shortly after the relevant testator's death;
- two of the four testamentary trusts were not required to file any accounting reports in Connecticut probate court (other than a final accounting upon the trust's expiration), and two of them had no beneficiaries residing in Connecticut;
- the inter vivos trust filed no accountings in Connecticut courts, but did have a noncontingent beneficiary who was a domiciliary and resident of the State; and
- with the exception of the probate proceedings for the testimentary trusts, accountings for some of the testamentary trusts, and this proceeding, none of the trustees, acting as trustee, has ever been a party to, or the subject of, any judicial or administrative proceeding in any Connecticut court.

C. The Proceedings Below.

The Trustees paid the Connecticut income taxes assessed for 1993 on their respective trusts and filed claims for refunds. When Respondent denied those claims, the Trustees commenced this action in the Connecticut Superior Court, alleging a violation of the Due Process Clause and the Commerce Clause. On the stipulated facts noted above, the parties filed cross-motions for summary judgment. The trial court denied the Trustees' motion and granted the Respondent's motion. Pet. App. 97a.[8] The Trustees' appeal to the Connecticut Appellate Court was pretermitted when the Connecticut Supreme Court

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[8] The trial court's ruling was based on the Commerce Clause and the federal Due Process Clause. It declined to rule on a state constitutional claim raised by petitioners. Pet. App. 79a n.4.

transferred the appeal to itself and *sua sponte* determined to hear it *en banc*.

The Supreme Court of Connecticut affirmed by decision of June 1, 1999. Pet. App. 1a. It began with a federal due process analysis focused on the testamentary trusts, starting with a catalogue of several tests it considered relevant in assessing the constitutionality of a state tax.[9] In the end, however, it proposed its own test, namely "whether the contacts between the testamentary trusts and Connecticut are sufficient constitutionally for Connecticut to treat the trusts as if they were domiciliaries of the state * * *." Pet. App. 16a. It then held:

> [J]ust as a state may tax all of the income of a domiciliary, irrespective of its source, because of the legal benefits and opportunities it provides that permit the beneficiary to receive and enjoy the income, so may Connecticut tax the income of these testamentary trusts because of the benefits and opportunities that it provides to them. Pet. App. 21a.

The only "benefits and opportunities" common to all four testimentary trusts were that state law provides for their establishment, requires Probate Court approval of "the original trustees and their successors," provides for a final accounting, and offers the Probate Court as a forum

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[9] It mentioned *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940) (the tax must "bear[] a fiscal relation to protection, opportunities and benefits given by the state."); the two-part test of *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 436-437 (1980) (due process requires "a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise."); and the adjudicative jurisdictional approach of *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 298 (1997) (inquiring "whether a defendant's contacts with the forum made it reasonable * * * to require it to defend the suit in that State."). Pet. App. 12a-15a.

in which to resolve disputes over trust administration. Pet. App. 21a. "[T]his panoply of legal benefits and opportunities," said the Connecticut Supreme Court, 'is comparable to those general legal benefits and opportunities that justify the imposition of taxes on the income of individual domiciliaries of the state." Pet. App. 30a. And, although the court held that "the benefits afforded by the state" must be "more than historical," and "must generally span the time period during which the income was earned," it held that "[t]he panoply of benefits afforded in the present case * * * amply meets that test." Pet. App. 33a.

The court noted that state courts in Maine, Missouri, New Jersey, and New York had reached contrary results, but it simply disagreed with those cases, noting that they were decided prior to *Quill Corp.* v. *North Dakota,* 504 U.S. 298 (1997). Pet. App. 31a.

The court then turned to the inter vivos trust, which it said presented "a closer case than that with respect to the testamentary trusts." Pet. App. 34a. It held, however, that

> *the critical link* to the undistributed income sought to be taxed is the fact that the noncontingent beneficiary of the inter vivos trust during the tax year in question was a Connecticut domiciliary. * * * Although the connection is more attenuated than in the case of a testamentary trust, it is sufficient for purposes of due process of law. Pet. App. 34a-35a (emphasis added).

The court recognized that its holding in this regard was contrary to the holding in *Safe Deposit & Trust Co.* v. *Virginia,* 280 U.S. 83 (1929), but it ruled that *Safe Deposit* was no longer "still good law." Pet. App. 36a.

Turning next to the Commerce Clause challenges, the court noted that Connecticut law provides no credit with respect to taxes paid to another state on trust income "derived from intangible personalty, such as dividends, interest and capital gains from the sale of securities." Pet. App. 39a (footnote omitted). Because all of the trusts' income in 1993 came from such sources, "no credit would have been available to them under the current tax scheme." Pet. App. 40a (footnote omitted).

The court agreed with the Trustees that the absence of a credit gave testators and settlors "an incentive to appoint only Connecticut trustees because appointing a trustee in another state" would subject the trust to the risk of a second tax in that state. Pet. App. 41a. The risk was multiplied in the case of inter vivos trusts, since the presence of out-of-state noncontingent beneficiaries as well as trustees "increases the risk of multiple taxation even further." Pet. App. 42a (internal quotations omitted). But the court held that, "[a]lthough we agree that there are such incentives and risks, we conclude that they are too remote and speculative to constitute a dormant commerce clause violation." Pet. App. 42a.

Two Justices of the Connecticut court dissented. They would have held due process denied because "none of the benefits [to the trusts] cited by the majority is fiscally relevant, and Connecticut has done nothing in the years since the creation of the trusts to foster the economic environment in which the trust income has been produced." Pet. App. 46a (citations omitted). Thus they would have followed "the majority of courts that have considered the issue," whose decisions they believed were unaffected by *Quill Corp.* Pet. App. 46a-47a.

The dissenters then noted that this Court "has clearly indicated that the risk, and not only the actuality, of multiple state taxation suffices to establish" a violation of

the Commerce Clause. Pet. App. 47a (citations omitted). They concluded that, "[w]ithout any provisions for appointment or tax credits, the Connecticut income tax on these trusts lacks internal and external consistency and violates the negative implications of the commerce clause." Pet. App. 48a.

REASONS FOR GRANTING THE WRIT

Three reasons commend this case for review. First, the decision below conflicts with this Court's decision in *Safe Deposit & Trust Co.* v. *Virginia,* 280 U.S. 83 (1929), pronounced no longer good law by the Connecticut Supreme Court. We believe that *Safe Deposit* remains good law and should be reaffirmed, but if we are wrong on that score it should be this Court's prerogative to say so.

Second, the decision below squarely conflicts with decisions of the highest courts of other states regarding the scope and effect of the Due Process Clause. This Court provides the only forum capable of resolving this conflict, and its guidance is clearly needed so that (a) state taxing jurisdictions may plan their revenue generating efforts with confidence, (b) testators and settlors may fully understand the consequences of their decisions in creating trusts, and (c) trust companies, banks, and other trustees may reliably predict and fulfill their fiduciary duties.

Finally, in our view the decision below was wrongly decided and warrants review so that its errors may be corrected.

The rationale of the court below—that certain minimum contemporary contacts may immunize a tax on trusts against constitutional challenge—may be used to justify a tax on any trust having some contact with the taxing state, not just trusts created by income tax residents. Thus the decision below presents fundamental questions regarding the contemporary nexus between a trust and the

taxing state required by the Constitution in order to permit current income taxation.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *SAFE DEPOSIT & TRUST CO. v. VIRGINIA*

In *Safe Deposit & Trust Co.* v. *Virginia*, 280 U.S. 83 (1929), this Court held, as a matter of due process, that the presence in Virginia of a beneficiary of an inter vivos trust established by a Virginia resident did not permit Virginia to assess an *ad valorem* tax on the trust's intangible property when the trustee and trust property were in Maryland. The Connecticut Supreme Court recognized that its ruling upholding the tax on the inter vivos trust in this case conflicts with that decision but held that *Safe Deposit* is no longer good law. Pet. App. 36a.

It is true that *Safe Deposit* "is consistent with the view that the Due Process Clause * * * debars double taxation by the states," (II JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 20.09[2] at 20-77 (3rd ed. 1998)), a view the Court repudiated in *Curry* v. *McCanless*, 307 U.S. 357 (1939). But *Safe Deposit* rests more fundamentally on the Court's view of a state's power "to tax things wholly beyond [the state's] jurisdiction or control." *Safe Deposit*, 280 U.S. at 92. *See Mercantile-Safe Deposit & Trust Co.* v. *Murphy*, 15 N.Y.2d 579, 581, 255 N.Y.S.2d 96, 97, 203 N.E.2d 490, 491 (1964) (*Safe Deposit's* holding as to the taxing power of the state, regardless of any issue of double taxation, was confirmed in *Guaranty Trust Co. v. Virginia*, 305 U.S. 19 (1937) and remains good law); *Pennoyer* v. *Taxation Div. Dir.*, 5 N.J.Tax 386, 396 (1983) (same).

Moreover, *Safe Deposit* has been cited and relied upon numerous times over the years,[10] and no court other than

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10 *Blue* v. *Department of Treasury*, 462 N.W.2d 762, 763 (Mich. Ct. App. 1990) (following *Safe Deposit*); *Pennoyer* v. *Taxation*

the Connecticut Supreme Court has directly challenged its continuing vitality.[11]

As we will show below, the states are in considerable disarray over the issue of their power to tax the income of trusts. If there are legitimate questions concerning the enduring health of *Safe Deposit*, this Court alone should resolve them, for the lower courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*

Div. Dir., 5 N.J. Tax 386, 396 (1983) (following *Safe Deposit* and declaring it good law); *Taylor* v. *State Tax Comm'n*, 85 A.D.2d 821, 821 (3rd Dep't 1981); *Swift* v. *Director of Revenue*, 727 S.W.2d 880, 882 (Mo. 1987) (following *Safe Deposit*); *Mercantile-Safe Deposit & Trust Co.* v. *Murphy*, 15 N.Y.2d 579, 581, 255 N.Y.S.2d 96, 97, 203 N.E.2d 490, 491 (1964) (following *Safe Deposit* and declaring it good law); *McCulloch* v. *Franchise Tax Bd.*, 390 P.2d 412, 418 (Cal. 1964) (en banc), *appeal dismissed*, 379 U.S. 133 (1964) (dismissed for lack of substantial federal question); *Town of Cady* v. *Alexander Constr. Co.*, 107 N.W.2d 267, 270 (Wis. 1961); *Dominion Nat'l Bank* v. *Jones*, 118 S.E.2d 672, 673 (Va. 1961).

This Court cited *Safe Deposiit* as good law in *Curry* v. *McCanless*, 307 U.S. at 370; *Texas* v. *Florida*, 306 U.S. 398, 408 (1939); and *Guaranty Trust Co.* v. *Virginia*, 305 U.S. 19, 23 (1938).

[11] In *McCulloch* v. *Franchise Tax Bd.*, 390 P.2d 412, 418 (Cal. 1964) (en banc), *appeal dismissed*, 379 U.S. 133 (1964) (dismissed for lack of substantial federal question), the California Supreme Court ruled as a matter of due process that the presence of a trust beneficiary in California justified that State's taxation of the trust. The court, however, failed to note or explain the conflict between its ruling and *Safe Deposit*. Significantly, the trust beneficiary who resided in California in *McCulloch* was also a trustee of the trust. *See McCulloch*, 390 P.2d at 415. The court concluded that the domicile of a trustee in California alone provided a clear constitutional basis for taxation of the trust. *See id.* at 418-19 (citing *Greenough* v. *Tax Assessors*, 331 U.S. 486, 493-94 (1947)). Hence, the secondary holding of the *McCulloch* court that the trustee's alter ego, as trust beneficiary, provided separate support for California to tax the trust amounted to dicta that this Court properly declined to review.

v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). If, on the other hand, the principles underlying *Safe Deposit* remain sound, the Court should take this opportunity to reaffirm them and reverse the decision below. In either event the Court should hear this case to resolve the frontal challenge to one of its own decisions.[12]

II. THE INTERPRETATION OF THE DUE PROCESS CLAUSE BY THE COURT BELOW CONFLICTS WITH DECISIONS OF THE HIGHEST COURTS OF OTHER STATES

The Connecticut Supreme Court acknowledged that its holding that the Due Process Clause permits the states to impose a tax like the one at issue here conflicts with holdings of other state courts, including *Swift* v. *Director of Revenue*, 727 S.W.2d 880 (Mo. 1987) (en banc). Pet. App. 31a. That case, which involved a testamentary trust, was indistinguishable on its facts from two of the trusts at bar: the testator was a Missouri resident but the trustees, beneficiaries, trust assets, and trust administration were all out of state.[13] The Missouri Supreme Court rejected the State's argument that "the administration of Swift's estate by a Missouri probate court, together with Swift's Missouri domicile at death and the creation of the subject trusts by a 'Missouri' will, provides

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[12] At least five states in addition to Connecticut tax the income of trusts solely on the presence of beneficiaries in the state. *See* ARIZ. REV. STAT. §§ 43-1312,-1313 (1980); CAL. REV. & TAX. CODE § 17742 (West 1994); GA. CODE ANN. § 48-7-22(a)(1)(C) (1999); N.C. GEN. STAT. § 105-160.2 (1999); TENN. CODE ANN. § 67-2-110 (1999).

[13] The Parry Trust and the Dallett Trust meet all of these criteria. The Stewart Trust and Worcester Trust differ in that they had beneficiaries who resided in the taxing state. The Adolfsson Trust differs in that it is an inter vivos trust that has a beneficiary residing in the taxing state.

a sufficient nexus to justify the imposition of income tax," holding instead that, since the State was "providing no present benefit or protection to the subject trusts, their beneficiaries, trustees, or property," the tax was impermissible under the Due Process Clause. *Swift*, 727 S.W.2d at 882.

The Missouri court noted that its decision was consistent with a number of other cases, including *Mercantile-Safe Deposit & Trust Co.* v. *Murphy*, 15 N.Y.2d 579, 255 N.Y.S.2d 96, 203 N.E.2d 490 (1964), in which the Court of Appeals of New York held that, under the Due Process Clause, the state could not tax the undistributed income of an inter vivos trust created by a resident when the trustee, trust assets, and trust administration were in Maryland.

Other decisions in conflict with the decision below include *Blue* v. *Department of Treasury*, 462 N.W.2d 762 (Mich. Ct. App. 1990) (inter vivos trust, following *Swift* and *Mercantile* on similar facts); *Pennoyer* v. *Taxation Div. Dir.*, 5 N.J. Tax 386, 397 (Tax Ct. 1983) (following *Mercantile* and finding it insufficient "that the grantor was domiciled here, letters were issued here, the trustee is amenable to service of process here and the courts are available to resolve disputes relating to the trust."); *Taylor* v. *State Tax Comm'n*, 85 A.D.2d 821, 822, 445 N.Y.S.2d 648, 649 (3rd Dep't 1981) (citing *Mercantile* and *Safe Deposit* in holding that the residency of the testamentary trust was insufficient to allow the tax); and *Potter* v. *Taxation Div. Dir.*, 5 N.J. Tax 399 (1983) (inter vivos trust, companion to *Pennoyer*). *See also City of Augusta* v. *Kimball*, 40 A. 666 (Me. 1898) (state tax statute could not reach out-of-state trustees and trust assets even though trustees were named under a will made by a Maine resident and appointed by Maine probate court).

On the other hand, the decision below follows *District of Columbia* v. *Chase Manhattan Bank*, 689 A.2d 539 (D.C. 1997), which also upheld against a Due Process and Commerce Clause challenge a state tax on the undistributed income of a resident testamentary trust even though the trustees, trust assets, and trust administration were out of state. *See also First Nat'l Bank of Boston* v. *Harvey*, 16 A.2d 184 (Vt. 1940) (state may tax intangible property in a trust created by a will allowed by the probate court regardless of the location of the trustee or trust assets).

This division among the state courts needs to be resolved for intensely practical reasons. The Federal Deposit Insurance Corporation estimates that, as of December 31, 1997 (the latest date for which figures are available), over $1.07 trillion was held in personal trusts by 2,467 banking institutions. FEDERAL DEPOSIT INSURANCE CORPORATION, TRUSTS ASSETS OF FINANCIAL INSTITUTIONS—1997 Table A-2 (1997). That estimate is 25% higher than the previous year's. *Id.* Table A-6. These figures show that trusts play an increasingly important role as an asset management tool for a growing number of individuals. Beyond traditional estate and tax planning for the wealthy, trusts are commonly used in planning for the care of minors and incompetents, in planning for retirement and insurance benefits held by many employees, and in planning to avoid expensive or burdensome state probate procedures.[14] Testators and settlors planning for the future have a legitimate and pragmatic

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[14] Federal tax laws enacted over the last twenty years have greatly fueled the demand for trusts, rendering them indispensable in preserving numerous tax benefits, including the $650,000 "applicable exclusion amount" against the estate tax, the $1,000,000 exemption from the generation-skipping transfer tax, and the marital deduction for transfers at death to a noncitizen spouse. *See* I.R.C. §§ 2010, 2631 and 2056A (West 1989).

need to know, with an acceptable degree of assurance, the tax consequences of their choices.

In addition, trusts obviously represent a huge source of potential tax revenues for the states. This Court's guidance is necessary so that, in planning their budgets, state taxing authorities may reliably predict that their revenue generating statutes are on sound constitutional footing and will not be set aside years after the fact.[15]

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[15] Twelve states and the District of Columbia have income tax statutes that tax trusts in a manner similar to Connecticut's. *See* D.C. CODE ANN. § 47-1809.1 (1999); 35 ILL. COMP. STAT. 5/1501 (1999); ME. REV. STAT. ANN. § 5102(4) (1998); MICH. COMP. LAWS ANN. § 206.18(1)(C) (1999); MO. REV. STAT. § 143.331 (1999); NEB. REV. STAT. § 77-2714.01(6) (1998) and NEB. ADMIN. R. & REGS. § 23-001 (1975); N.J. STAT. ANN. § 54A:1-2(o) (1999); N.Y. TAX LAW § 605(b)(3) (McKinney 1999); OKLA. STAT. tit. 68, § 2353(6) (1998); 72 PA. CONS. STAT. § 301(s) (1998) and 61 PA. CODE § 101.1 (1999); VT. STAT. ANN. tit. 32, § 5811(11) (1999); W. VA. CODE § 11-21-7(c) (1999) and W. VA. CODE ST. R. tit. 110-21-18 (1990).

At least four states have statutes that tax trusts where the sole contact is the in-state presence of a trustee. *See* ARIZ. REV. STAT. §§ 43-1312, -1313 (1980); ARK. CODE ANN. § 26-51-203 (Michie 1997); CAL. REV. & TAX CODE § 17742 (West 1994); HAW. REV. STAT. § 235-1 (1999). Some state statutes will tax trusts where the sole contact is the in-state presence of a beneficiary. *See supra* note 12.

At least five states tax trusts where the trust administration is conducted in-state. *See* COLO. REV. STAT. ANN. § 39-22-103(10) (1998); HAW. REV. STAT. § 235-1 (1999); IND. CODE ANN. § 6.3-1-3.5 (Michie 1998) and IND. ADMIN. CODE tit. 45, r. 3.1-1-12 (1999); S.C. CODE ANN. § 12-6-30(5) (1998); VA. CODE ANN. § 58.1-302 (1999).

Other states tax trusts upon various combinations of contacts. *See* DEL. CODE ANN. tit. 30, §§ 1136(a), 1140(a) (1998); MD. CODE ANN., TAX-GEN. §§ 10-101(h)(1)(iii), 10-207(o) (1998); MASS. GEN. LAWS ch. 62, 10(a), (c) (1999); N.H. REV. STAT. ANN. § 77:10 (1999); R.I. GEN. LAWS § 44-30-5(a)(c) (1998); UTAH CODE ANN. § 59-10-103(1)(k)(i), (ii) (1999). One state, North Dakota, will tax any trust that "has a relationship to the state sufficient to create nexus," which is deemed to be satisfied by the

Finally, clarification is required so that the professionals whose livelihoods concern the administration of trusts—trust companies, banks, individual trustees—may properly discharge their fiduciary duties. Under general principles of trust law, trustees have a fiduciary duty to ensure that their trusts pay only valid debts. A trustee who pays a constitutionally suspect state tax which later proves to be unconstitutional may face personal liability to the trust beneficiaries if the payment cannot be recouped. Similarly, a trustee who refuses to pay a state tax on constitutional grounds may face personal liability if the tax later is held constitutional and penalties and interest for nonpayment are assessed. In some cases the trustee may guard against these adverse consequences by paying the tax and suing to recover it, but as a practical matter that alternative may be foreclosed to the trustee of a modest trust.[16]

In short, this is an area of the law in which certainty is particularly important. States, trustees, testators, settlors, and trust beneficiaries all have significant stakes in, and for pressing practical reasons have a legitimate need for, the resolution of the due process questions dividing the state courts. This case, presenting clearly

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presence of any trustee, settlor, beneficiary or trust asset in the state, as well as the choice of state law as the trust's governing law. *See* N.D. CENT. CODE § 57-38-07 (1999) and N.D. ADMIN. CODE § 81-03-02.1-04 (1998).

16 Trust companies and banks face the additional dilemma of whether to track the whereabouts of all beneficiaries of each trust they administer. For some institutions such a task might involve tens of thousands of beneficiaries. Trustees typically track only key beneficiaries on a yearly basis, but if states may tax trusts based on the presence of all beneficiaries, including even remaindermen, then trustees face potential liability if they fail to track them all and make proper payments of state taxes. If states may *not* tax based on the presence of beneficiaries, then trustees face potential liability if they incur the unnecessary tracking expenses.

drawn legal issues and undisputed facts regarding five trusts with different contacts with the taxing state, presents an ideal vehicle for the conflict's resolution.

III. THE DECISION BELOW WAS WRONGLY DECIDED UNDER BOTH THE DUE PROCESS CLAUSE AND THE COMMERCE CLAUSE

A. The Due Process Clause.

All of the trusts in this case had out-of-state trustees, assets, administration, and income. With respect to the testamentary trusts, the court below found that Connecticut satisfied the requirements of the Due Process Clause for an inescapable, *perpetual* tax on trust income because, in the court's view, the State provided those trusts a "panoply of legal benefits and opportunities." Pet. App. 30a. With respect to the Parry Trust, however, which had no beneficiaries in the state and was not required to file annual accountings, (Pet. App. 80a), the contemporary "benefits and opportunities" amounted to little more than an open courthouse door.[17] Moreover, with respect to all of the trusts, as the dissenters recognized, "none of the benefits cited by the majority is fiscally relevant, and Connecticut has done nothing in the years since the creation of the trusts to foster the economic environment in which the trust income has been produced." Pet. App. 46a.[18]

In short, there was a paucity not a panoply of contemporary, fiscally relevant benefits on which to justify the perpetual tax. That is why the Michigan Court of Ap-

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[17] The Dallett Trust was like the Parry Trust except that it filed occasional accountings in the state probate court; the Stewart Trust had an in-state beneficiary; the Worcester trust both filed accountings and had an in-state beneficiary. Pet. App. 81a-83a.

[18] The state's taxing power must bear "fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

peals analogized a similar statute to one "authorizing that any person born in Michigan to resident parents is deemed a resident and taxable as such, no matter where they reside or earn their income."[19] And that is why the majority of cases to have considered essentially the same constellation of facts has struck down similar taxing schemes under the Due Process Clause. *See supra* p. 14.

Those cases have not been weakened by *Quill Corp.* There this Court overruled so much of *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967), as held that the Due Process Clause forbade a state from taxing an individual or entity having no physical presence within the state, and substituted for the physical presence requirement a test similar to the one for judicial jurisdiction. The *Quill Corp.* Court held:

> So long as a commercial actor's efforts are 'purposefully directed' towards residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. * * * Comparable reasoning justifies the imposition of the [tax] collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." 504 U.S. at 308 (citations omitted; brackets in original).

The State of Connecticut failed to satisfy this test because none of the trusts in this case, nor (so far as appears) any of the trusts in the pre-*Quill Corp.* cases the Connecticut Supreme Court refused to follow, made any

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[19] *Blue* v. *Department of Treasury*, 462 N.W.2d 762, 764 (Mich. Ct. App. 1990).

"purposefully directed" efforts towards the taxing state that bore any relationship to the production of their income, or that were of a magnitude remotely comparable to the efforts of Quill, or that otherwise could be considered sufficient for due process purposes. Hence *Quill Corp.* does not diminish the force of the decisions in conflict with this case.

With respect to inter vivos trusts, the court below declined to rely at all on the contacts it deemed sufficient to tax the testamentary trusts (since virtually none of those contacts occurs in the case of inter vivos trusts), but instead overruled *Safe Deposit* and justified the tax solely on the basis of the in-state presence of a trust beneficiary. That ruling was incorrect for either or both reasons that *Safe Deposit* is still good law, or, if it is not, the in-state presence of a beneficiary is in any event insufficient to justify a tax on the undistributed income of a trust with out-of-state trustees, assets, administration, and income.

B. The Commerce Clause.

The Connecticut tax violates the Commerce Clause if for no other reason than the "substantial nexus" required by that Clause sets a higher bar than the "minimum contacts" test of the Due Process Clause. *Quill Corp.*, 504 U.S. at 313 (1992). Since, as we have shown, the Connecticut tax fails the due process test on this score, *a fortiori* it fails the Commerce Clause nexus test as well.

Moreover, the Commerce Clause prohibits a state from imposing an unapportioned income tax upon a taxpayer if any other state possesses the power to impose an apportioned income tax upon the same taxpayer. *See, e.g., Mobil Oil Corp.* v. *Commissioner of Taxes,* 445 U.S. 425, 445-446 (1980). *See also* I JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 8.02[1] at 8-10 (3rd ed. 1998) ("[I]f a taxpayer located in State A

can demonstrate that it is taxable in State B, the taxpayer has a constitutional right to insist that State A attribute at least a portion of the taxpayer's overall tax base —whether it be property, income, or receipts—to State B.").

In this case, Connecticut makes no effort at all to apportion its tax on income earned by the testamentary trusts from intangible property such as stocks, bonds, and other securities (which is likely to represent most or all of the income for most trusts). Instead it taxes the full value of the undistributed trust income and provides no credit for taxes paid to other states on such intangible property, even though that income could also be taxed by New York given the presence of the trustee in that state. *See Greenough* v. *Tax Assessors*, 331 U.S. 486, 487 (1947) (a state may tax an out-of-state trust based solely on the residence of a trustee in the state).[20] With respect to inter vivos trusts, as the court below noted, the presence of noncontingent beneficiaries outside of Connecticut "increases the risk of multiple taxation even further." Pet. App. 42a (internal quotations omitted).

Connecticut's failure to share the tax base of income from intangible property earned by testamentary trusts not only threatens such trusts with multiple taxation,[21]

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20 The court below erroneously believed that, since New York has not actually taxed the trusts, the risk of multiple taxation was too remote and speculative to create a Commerce Clause violation. This Court made it clear in *Mobil* that "the constitutionality of [one state's] tax should not depend on the vagaries of [another state's] tax policy." *Mobil*, 445 U.S. at 444. If Connecticut can tax all of the trust income based on the domicile of its creator, surely New York could tax the same income based on the domicile of the trustee and the location of the trust assets. This (when no credits are available) is precisely the kind of multiple taxation that the Commerce Clause forbids.

21 Although this Court has excused the risk of multiple taxation that results when different states pursue different, constitutionally

but also creates a discriminatory effect. The Connecticut Supreme Court agreed with petitioners' contention that, under Connecticut's statute, "testators will have an incentive to appoint only Connecticut trustees because appointing a trustee in another state necessarily subjects the testamentary trust to the risk of a second income tax in that State." Pet. App. 41a-42a (internal quotations omitted). The incentive is not accidental. As the trial court noted, the current version of the tax came about as a consequence of lobbying by Connecticut banks concerned about competition from trustees in other states. Pet. App. 94a.

This Court has repeatedly struck down similar tax incentives designed to favor the state home team. *See, e.g., Bacchus Imports, Ltd.* v. *Dias,* 468 U.S. 263, 271, 272 (1984) (invalidating a Hawaii liquor tax which exempted locally produced alcoholic beverages so as "to aid Hawaiian industry" as " 'economic protectionism' in every sense of the phrase"); *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318 (1977) (striking down a New York transfer tax on various sales of securities that had been enacted under pressure from the New York Stock Exchange and whose purpose and effect was to protect the New York securities industry against out-of-state competitors).

The court below attempted to excuse the discriminatory motive of the Connecticut tax by arguing that its discriminatory effect was speculative because, in choosing a trustee, testators might be influenced by factors other than

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acceptable formulas for apportioning a tax base, *see, e.g., Moorman Mfg. Co.* v. *Bair,* 437 U.S. 267, 278-279 (1978), in this case Connecticut has not simply selected one formula for apportionment that *may* overlap with other permissible methods. Instead, it has refused to apportion its income tax altogether, which creates a risk of multiple taxation that will persist no matter how other states apportion their taxes.

the risk of multiple taxation. This argument concedes the existence of discrimination and addresses its extent. Similar arguments were rejected in *Bacchus Imports*, 468 U.S. at 268-69 (discriminatory tax invalidated even though the exempted alcohol constituted less than one percent of sales in the state), and *Boston Stock Exchange*, 429 U.S. at 334 n.13 ("Whatever the current inclinations of New York investors [in choosing an exchange], the clause protects out-of-state businesses from *any* discriminatory burden on their interstate commercial activities.") (emphasis added).[22]

Regardless of the extent of discrimination under the Connecticut tax, the possibility of multiple taxation will ultimately discourage some testators from choosing out-of-state trustees, as intended by the Connecticut legislature. And so long as the tax has *some* discriminatory effect it is impermissible under the Commerce Clause. This Court has "never recognized a '*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 n.3 (1996); *see also Associated Indus. of Mo.* v. *Lohman*, 511 U.S. 641, 650 (1994) ("[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred.").

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22 Indeed, if there was anything unduly speculative in this case, it was the lower court's suppositions about why Connecticut residents might not care about the risks of multiple taxation. Thus the court supposed that residents will not try to avoid multiple taxes by appointing a local bank as trustee because they will recognize that it could be merged into an out-of-state bank. Pet. App. 43a. But in fact a possible merger would be no deterrent, since the trust agreement could easily include a provision calling for the replacement of the trustee if it fails to remain local.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 27, 1999

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APPENDICES

APPENDIX A

SUPREME COURT OF CONNECTICUT

(SC 15875)

CHASE MANHATTAN BANK, TRUSTEE, *et al.*

v.

GENE GAVIN, COMMISSIONER OF REVENUE SERVICES

Argued October 27, 1998

Officially Released June 1, 1999

OPINION

BORDEN, J.

The issues in this appeal are whether Connecticut's tax on the undistributed taxable income of four testamentary trusts and one inter vivos trust: (1) violates the due process clause of the fourteenth amendment to the United States constitution;[1] and (2) unduly burdens interstate commerce in violation of the commerce clause of the United States constitution.[2] The named plaintiff, Chase

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[1] The fourteenth amendment to the United States constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . . ."

[2] The constitution of the United States, article one, § 8, provides in relevant part: "The Congress shall have Power . . . to regulate Commerce . . . among the Several States . . . ."

Manhattan Bank, and the plaintiff cotrustees (plaintiff),[3] appeal from the summary judgment of the trial court in favor of the defendant, Gene Gavin, the commissioner of revenue services.[4] By that judgment, the trial court rejected the plaintiff's requests for refunds of the 1993 income taxes paid by the plaintiff as trustee of the trusts. The plaintiff claims that the relevant taxation scheme, as applied to it, violates the due process clause and commerce clause of the federal constitution. We affirm the judgment of the trial court.

After paying the 1993 income taxes imposed on the trusts in question, the plaintiff requested refunds from the defendant, who denied the requests. The plaintiff appealed from the denials to the trial court pursuant to General Statutes § 12-730.[5] In the trial court, the parties stipu-

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[3] Chase Manhattan Bank is the successor trustee to Manufacturers Hanover Trust Company, Chemical Bank and Central Hanover Bank for the various trusts involved in this case. The other plaintiffs in this appeal are cotrustees with Chase Manhattan Bank for two of the testamentary trusts: (1) Elizabeth B. Parry and Harrison F. Durand are cotrustees of the Parry Trust; and (2) Bernard L. Pacella is cotrustee of the Dallett Trust. Chase Manhattan Bank is the sole trustee of the remaining two testamentary trusts, namely, the Stewart Trust and the Worcester Trust, and of the inter vivos trust, namely, the Adolfsson Trust. Although Chemical Bank was the corporate trustee for the tax year in question and initially brought this action, in 1996 it merged with Chase Manhattan Bank and the name of the surviving corporation was changed from Chemical Bank to Chase Manhattan Bank. Hereafter, we refer to Chase Manhattan and the individual cotrustees collectively as the plaintiff.

[4] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 4023, now § 65-1, and General Statutes § 51-199(c).

[5] General Statutes § 12-730 provides in relevant part: "Notwithstanding the provisions of chapter 54 to the contrary, any taxpayer aggrieved because of any determination or disallowance by the

lated to the facts, submitted uncontroverted affidavits, and filed cross motions for summary judgment. The court granted the defendant's motion for summary judgment, denied the plaintiff's motion, and rendered judgment for the defendant. This appeal followed.

The facts are undisputed. The plaintiff, a banking corporation incorporated under the laws of New York, is the trustee of the four testamentary trusts, namely, the Parry Trust, the Dallett Trust, the Stewart Trust and the Worcester Trust, and of the single inter vivos trust, namely, the Adolfsson Trust. All of the trusts are resident trusts as defined by General Statutes § 12-701(a)(4).[6] Each testamentary trust is "a trust . . . consisting of

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commissioner under section 12-729 or 12-732 may, within one month after notice of the commissioner's determination or disallowance is mailed to the taxpayer, take an appeal therefrom to the superior court for the judicial district of Hartford . . . ."

[6] General Statutes § 12-701(a)(4) provides: " 'Resident trust or estate' means (A) the estate of a decedent who at the time of his death was a resident of this state, (B) the estate of a person who, at the time of commencement of a case under Title 11 of the United States Code, was a resident of this state, (C) a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at the time of his death was a resident of this state, and (D) a trust, or a portion of a trust, consisting of the property of (i) a person who was a resident of this state at the time the property was transferred to the trust if the trust was then irrevocable, (ii) a person who, if the trust was revocable at the time the property was transferred to the trust, and has not subsequently become irrevocable, was a resident of this state at the time the property was transferred to the trust or (iii) a person who, if the trust was revocable when the property was transferred to the trust but the trust has subsequenly become irrevocable, was a resident of this state at the time the trust became irrevocable. For purposes of this chapter, if any trust or portion of a trust, other than a trust created by the will of a decedent, has one or more nonresident noncontingent beneficiaries, the Connecticut taxable income of the trust, as defined in subdivision (9) of this subsection, shall be modified as follows: The Connecticut taxable income of the trust

property transferred by will of a decedent who at the time of his death was a resident of this state";[7] General Statutes § 12-701(a)(4)(C); and the inter vivos trust is "a trust . . . consisting of the property of . . . a person who was a resident of this state at the time the property was transferred to the trust if the trust was then irrevocable . . . ." General Statutes § 12-701(a)(4)(D)(i); see footnote 6 of this opinion. More specifically, the Parry Trust was established in 1968 under the will of Sidney L. Parry, a Connecticut domiciliary, and was probated in the Probate Court for the district of Westport. The Dallett Trust was established in 1975 under the will of John Dallett, a Connecticut domiciliary, and was pro-

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shall be the sum of all such income derived from or connected with sources within this state and that portion of such income derived from or connected with all other sources which is derived by applying to all such income derived from or connected with all other sources a fraction the numerator of which is the number of resident noncontingent beneficiaries and the denominator of which is the total number of noncontingent beneficiaries. For purposes of section 12-700a, if any trust or portion of a trust, other than a trust created by the will of a decedent, has one or more nonresident noncontingent beneficiaries, its adjusted federal alternative minimum taxable income, as defined in section 12-700a shall be modified as follows: The adjusted federal alternative minimum taxable income of the trust shall be the sum of all such income derived from or connected with sources within this state and that portion of such income derived from or connected with all other sources which is derived by applying to all such income derived from or connected with all other sources a fraction, the numerator of which is the number of resident noncontingent beneficiaries and the denominator of which is the total number of noncontingent beneficiaries. As used in this subdivision, 'noncontingent beneficiary' means a beneficiary whose interest is not subject to a condition precedent."

[7] For purposes of chapter 229 of the General Statutes, the income tax provisions, § 12-701(a)(1), with certain exceptions not relevant here, provides in relevant part: " 'Resident of this state' means any natural person . . . who is domiciled in this state . . . ." Thus, for purposes of the state income tax, the term "resident of this state" means a Connecticut domiciliary.

bated in the Probate Court for the district of Westport. The Stewart Trust was established in 1974 under the will of Elvira R. Evens, a Connecticut domiciliary, and was probated in the Probate Court for the district of New Canaan. The Worcester Trust was established in 1936 under the will of James N. Worcester, a Connecticut domiciliary, and was probated in the Probate Court for the district of New Canaan. The Adolfsson Trust is an irrevocable inter vivos trust established in 1955 by Charles Anderson Dana, a Connecticut domiciliary.

It is undisputed that the plaintiff, acting as trustee, did not maintain any presence and was not a domiciliary or a resident of Connecticut, and that no asset of any trust was located in Connecticut in 1993. No aspect of trust administration was conducted in Connecticut in 1993, and except for this proceeding and the probate proceedings delineated later in this opinion, the plaintiff, as trustee, has not been the subject of any judicial or administrative proceeding in any Connecticut forum. The assets of all of the trusts for 1993 consisted solely of cash and securities held in accounts of the plaintiff as trustee in New York. None of the trusts earned any income derived from or connected with the ownership or disposition of any interest in real or tangible personal property, or from a business, trade, profession or occupation carried on by the trust in Connecticut or elsewhere. None of the four testamentary trusts paid any income taxes to any other state for 1993. The stipulation is silent on this point regarding the inter vivos trust.

None of the beneficiaries of the Parry Trust or the Dallett Trust was, or has been since its establishment, a resident or a domiciliary of Connecticut. The current income beneficiary of the Parry Trust is Elizabeth B. Parry. The trustee has the discretion to distribute prin-

cipal to her, and up to 50 percent of the income to the testator's grandchildren. Upon the death of Elizabeth B. Parry, Elizabeth Parry Miller will become the beneficiary and, upon her death, the trust will terminate and the trust assets will be distributed to the testator's then living issue. The current income beneficiary of the Dallett Trust is John Dallett, Jr. The trustee has discretion to distribute the principal to him. Upon his death, the trust will terminate and the trust assets will be distributed to Cassandra Dallett. With respect to the Stewart Trust, since its establishment in 1974, Grace Evens Stewart, a Connecticut domiciliary, was the income and discretionary principal beneficiary until her death in 1995, when the trust was terminated and the trust property was distributed to her two children, one of whom was a Connecticut resident. With respect to the Worcester Trust, the current income beneficiary is, and was during 1993, James N. Worcester, Jr., a Connecticut domiciliary, and upon his death the trust property will be distributed either by virtue of his exercise of a general testamentary power of appointment or, in default of such an appointment, to his four children, one of whom is currently a Connecticut domiciliary. With respect to the Adolfsson Trust, the sole current income beneficiary is, and was in 1993, Sandra Leigh Dana, a Connecticut domiciliary.[8] In 1993, she was thirty-nine

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[8] The stipulation provides that under the terms of the trust agreement, "the Trustee is directed to distribute all income to beneficiary Sandra Leigh Dana . . . in quarterly installments . . . ." Nonetheless, there was, with respect to this trust and to the other two trusts that had Connecticut domicilary beneficiaries in 1993, undistributed taxable income. The plaintiff states in its brief, without contradiction by the defendant: "For the three trusts herein that had beneficiaries in Connecticut in 1993, none of the beneficiaries had any present right or control over the portion of the trusts that were generating income subject to Connecticut's tax In each case, Connecticut only assessed an income tax upon realized capital gains and accumulated income that were not distributed to

years old. The trust will terminate upon her death or when she reaches the age of forty-eight, when the trust property will be distributed to her outright if she is then living or, if not, pursuant either to her testamentary power of appointment or to her then living descendants, who are currently her children living with her in Connecticut.

Under the terms of the Parry Trust, the plaintiff is excused from rendering periodic accounts to the Probate Court pursuant to General Statutes § 45a-177 [9] and,

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any beneficiary in 1993." The plaintiff does not dispute, moreover, that the Connecticut beneficiaries are taxable on the income that they receive from the trusts.

[9] General Statutes § 45a-177 provides: "(a) All conservators, guardians, persons appointed by the Court of Probate to sell land of minors and trustees, including those entrusted with testamentary trusts unless excused by the will creating the trust, shall render periodic accounts of their trusts under oath to the Court of Probate having jurisdiction for allowance, at least once during each three-year period and more frequently if required to do so by the will or trust instrument creating the trust. Periodic accounts for filing only may be submitted to the court at any time during each three-year period. Upon receipt of a periodic account, the court shall cause notice of it and of its availability for examination at the court to be given in such manner and to such parties as it deems reasonable. Any such party may apply to the court for a hearing on the account. If an application for such a hearing is not received by the court from a party in interest within the time stated in the notice, the periodic account will be filed without hearing thereon and without allowance or disallowance thereof, and shall not be recorded. At the end of each three-year period from the date of the last allowance of a periodic account, or upon the earlier receipt of a final account, there shall be a hearing on all periodic accounts not previously allowed, and the final account, if any, in accordance with sections 45a-178 and 45a-179.

"(b) Each such periodic account shall include an inventory of the trust estate showing fully how the principal of the fund is invested and the items of income and expenditure. If there has been no change in the identity of the items comprising the principal of the fund since the last account which has been accepted

accordingly, the plaintiff has not rendered any such periodic accounts. Thus, the plaintiff has been involved in probate proceedings only with respect to the probating of the testator's will. Under the terms of the Stewart Trust, the plaintiff is excused from rendering periodic accounts to the Probate Court pursuant to § 45a-177; see footnote 9 of this opinion; and, accordingly, the plaintiff has not filed any such periodic accounts. At the termination of the trust in 1995, however, the plaintiff filed a first and final acount for the period 1975 through 1995, which the Probate Court approved in February, 1996. With respect to the Dallett Trust, the plaintiff has filed six periodic accounts in the Probate Court for the periods 1976-79, 1979-82, 1982-85, 1985-88, 1988-91 and 1991-93, all of which the Probate Court approved. With respect to the Worcester Trust, the plaintiff has filed forty-one periodic accounts in the Probate Court, from 1937 through 1995, all of which the Probate Court approved. With respect to the Adolfsson Trust, the plaintiff has appeared in a Connecticut court only in connection with this tax appeal.

Before considering the merits of the plaintiff's claims, it is useful to discuss the application of the relevant tax statutes to the resident testamentary trusts and the inter vivos trust in this case. For the 1993 tax year, General Statutes § 12-700(a)[10] imposed a tax on "the Connecti-

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and approved, it shall not be necessary to include an inventory of the trust estate.

"(c) If the estate held by any person in any such fiduciary capacity is less than two thousand dollars, or, in the case of a corporate fiduciary under the supervision of the Commissioner of Banking or any other fiduciary bonded by a surety company authorized to do business in this state, ten thousand dollars, he shall not be required to render such account unless so ordered by the court."

[10] General Statutes § 12-700(a) provides in relevant part: "There is hereby imposed on the Connecticut taxable income of each resident of this state a tax:

cut taxable income" of all residents of the state, including trusts and estates. Under General Statutes § 12-701(a)(9),[11] the "'Connecticut taxable income of a resident trust or estate' shall mean the taxable income of the fiduciary of such trust or estate as determined for purposes of the federal income tax," subject to certain adjustments not relevant here. Under § 12-701(a)(4)(C), a resident testamentary trust is "a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at the time of his death was a resident of this state . . . .." Thus, all of the testamentary trusts in this case were resident trusts, and all of their 1993 undistributed taxable income statutorily was taxable in Connecticut.

The statutory taxation scheme of an inter vivos trust, however, is somewhat different and more complicated. Under § 12-701(a)(4)(D), a resident inter vivos trust is "a trust, or a portion of a trust, consisting of the property of (i) a person who was a resident of this state at

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"(1) At the rate of four and one-half per cent of such Connecticut taxable income for taxable years commencing on or after January 1, 1992, and prior to January 1, 1996.

"(2) For taxable years commencing on or after January 1, 1996, but prior to January 1, 1997, in accordance with the following schedule . . .

"(D) For trusts or estates, the rate of tax shall be 4.5% of their Connecticut taxable income. . . ."

[11] General Statutes § 12-701 provides in relevant part: "(a) For purposes of this chapter . . .

"(9) 'Connecticut taxable income of a resident trust or estate' shall mean the taxable income of the fiduciary of such trust or estate as determined for purposes of the federal income tax, to which (A) there shall be added or subtracted, as the case may be, the share of the trust or estate, as determined under section 12-716, in the Connecticut fiduciary adjustment and (B) with respect to any trust, there shall be added the amount of any includable gain, reduced by any deductions properly allocable thereto, upon which a tax is imposed for the taxable year pursuant to Section 644 of the Internal Revenue Code. . . ."

the time the property was transferred to the trust if the trust was then irrevocable . . . .." An inter vivos trust's taxable income for federal income taxes is considered—again, subject to certain adjustments not relevant here—to be its "Connecticut taxable income." General Statutes § 12-701(a)(9). This taxable income is modifiable, however, according to a formula that takes into account whether there is any resident noncontingent beneficiary of the trust.[12] Under the formula set forth in § 12-701(a)(4),[13] if there are no nonresident noncontingent beneficiaries, there is no modification. If, however, there are nonresident noncontingent beneficiaries then, as the defendant explains: "[T]he income simply would be prorated

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12 Section 12-701(a)(4) defines a "noncontingent beneficiary" as "a beneficiary whose interest is not subject to a condition precedent." The regulations of the department of revenue services further defines a "noncontingent beneficiary" as "every beneficiary whose interest is not subject to a condition precedent and includes every individual to whom a trustee of nontestamentary trust during the taxable year (i) is required to distribute currently income or corpus (or both) or (ii) properly pays or credits income or corpus (or both) or (iii) may, in the trustee's discretion, distribute income or corpus (or both). 'Noncontingent beneficiary' includes every beneficiary to whom or whose estate any of the trust's income for the taxable year is required to be distributed at a specified future date or event and every beneficiary who has the unrestricted lifetime or testamentary power, exercisable currently or at some future specified date or event, to withdraw any of the trust's income for the taxable year or to appoint such income to any person, including the estate of such beneficiary. . . ." Regs., Conn. State Agencies § 12-701(a)(9)-1(b)(3).

13 General Statutes § 12-701(a)(4) provides in relevant part: "The Connecticut taxable income of the trust shall be the sum of all such income derived from or connected with sources within this state and that portion of such income derived from or connected with all other sources which is derived by applying to all such income derived from or connected with all other sources a fraction the numerator of which is the number of resident noncontingent beneficiaries and the denominator of which is the total number of noncontingent beneficiaries. . . ."

and assigned to this State based upon the ratio of Connecticut noncontingent beneficiaries to all noncontingent beneficiaries. Thus, unlike testamentary trusts, inter vivos trusts are taxed only on that portion of the undistributed income which corresponds to the number of in-state [noncontingent] beneficiaries." In the present case, therefore, the Adolfsson Trust is a resident inter vivos trust and, because its only noncontingent beneficiary is a Connecticut domiciliary, all of its 1993 undistributed income was taxable in Connecticut.

As is evident from this discussion, the taxability of the income of the resident testamentary trusts in this case is based on the fact that the testators were Connecticut domiciliaries at the time of their deaths. The taxability of the income of the inter vivos trust in this case is based on the fact that the settlor of the trust was a Connecticut domiciliary when the trust was established and the beneficiary is a Connecticut domiciliary. The plaintiff claims that this taxation scheme, as applied to it, violates the due process clause and the commerce clause of the federal constitution. We consider the plaintiff's contentions in turn. We conclude that none of them is persuasive.

I DUE PROCESS OF LAW

A The Testamentary Trusts

With respect to the testamentary trusts, the plaintiff argues that, "[f]or Connecticut's power to tax these trusts to be upheld, Connecticut must provide the trusts with contemporaneous benefits, protections and opportunities. Those in turn must be 'fiscally' relevant to the rights of the trustees to receive and enjoy *income* and sufficient in scope to justify categorizing the trusts as *domiciliaries* However, Connecticut did not provide the trusts with such contemporaneous benefits and protections because, for

each trust, the trustees, the trust assets and administration were located outside of Connecticut's borders." (Emphasis in original.) We are not persuaded by this contention.

We begin with the observation that our task of evaluating the constitutionality of a legislative scheme of taxation is somewhat circumscribed. "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267 (1940).

"As a general principle, a State may not tax value earned outside its borders. See, e.g., Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 80-81 [58 S. Ct. 436, 82 L. Ed. 673] (1938). The broad inquiry in a case such as this, therefore, is "whether the taxing power exerted by the state bears a fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.' Wisconsin v. J. C. Penney Co., [supra, 311 U.S. 444]." ASARCO, Inc. v. Idaho State Tax Commission, 458 U.S. 307, 315, 102 S. Ct. 3103, 73 L. Ed. 2d 787 (1982).

This "broad inquiry" has been refined further into a two part test. "For a State to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two requirements: [1] a 'minimal connection' between the interstate activities and the taxing State, and [2] a rational relationship between the income attributed to the State and the intrastate values of the enterprise. Moorman Mfg. Co. v. Bair, 437 U.S. 267, [272-73, 98 S. Ct. 2340, 57 L. Ed. 2d 197] (1978); see

National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756 [87 S. Ct. 1389, 18 L. Ed. 2d 505] (1967), [rev'd on other grounds, Quill Corp. v. North Dakota, 504 U.S. 298, 306, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1997)]; Norfolk & Western R. Co. v. Missouri Tax Comm'n, 390 U.S. 317, 325 [88 S. Ct. 995, 19 L. Ed. 2d 1201] (1968)." Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, 436-37, 100 S. Ct. 1223, 63 L. Ed.. 2d 510 (1980); see also Quill Corp. v. North Dakota, supra, 306 ("The Due Process Clause 'requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax,' Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-45 [74 S. Ct. 535, 98 L. Ed. 2d 744] (1954), and that the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing state.'" Moorman Mfg. Co. v. Bair, [supra, 273].").

Neither party has focused at all on the second part of this due process test, namely, that the income attributed to the state must be rationally related to values connected with the taxing state.[14] Both parties have focused, instead,

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[14] Our brief inquiry into the second part of the test discloses that its principal application has been in cases in which a state seeks to attribute to its tax base some portion of the property or income of a multistate business enterprise that does business in the state. In such cases, the "values" to which the test refers are numerical, economic or fiscal values—property values in a broad sense; not values in a social science sense—and the cases require, in general terms, that only a fair proportion of the property or income of the total enterprise be attributed to the taxing state. See, e.g., Mobil Oil Corp. v. Commissioner of Taxes of Vermont, supra, 445 U.S. 425; Moorman Mfg. Co. v. Bair, supra, 437 U.S. 267; Norfolk & Western R. Co. v. Missouri Tax Commission, supra, 390 U.S. 317. Although the plaintiff in its brief mentions this part of the test in passing, we do not understand the plaintiff's arguments to rely on it.

on the first part of the due process test, namely, that there be some definite link or minimum connection between the state and the person, property or transaction it seeks to tax. We confine our discussion, therefore, to that aspect of the test as it applies to the facts of the present case.

In Quill Corp. v. North Dakota, supra, 504 U.S. 301, the United States Supreme Court confronted a due process challenge to North Dakota's imposition of a statutory duty on an out-of-state mail order house to collect and pay a use tax on goods purchased for use within the state. The court began its analysis by repeating the familiar two part test: "The Due Process Clause requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, Miller Brothers Co. v. Maryland, [supra, 347 U.S. 344-45], and that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State, Moorman Mfg. Co. v. Bair, [supra, 437 U.S. 273]." (Internal quotation marks omitted.) Quill Corp. v. North Dakota, supra, 306. The court noted, moreover, that "[h]ere, we are concerned primarily with the first of these requirements." Id.

The court then employed what it termed the "[c]omparable reasoning"; id., 308; of the due process cases in the field of "judicial jurisdiction." Id., 307. In doing so, the court "abandoned more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State." Id. Thus, the court in Quill Corp. v. North Dakota, supra, 504 U.S. 308, overruled, "as superseded by developments in the law of due process," the prior holdings in the area of sales and use taxes; see, e.g., Na-

tional Bellas Hess, Inc. v. Dept. of Revenue, supra, 386 U.S. 753; that "some sort of physical presence" of the seller in the taxing state is required in order for the state to impose such a duty on the seller. Quill Corp. v. North Dakota, supra, 306-307.

In place of a physical presence of the out-of-state mail order seller, the court borrowed, from the adjudicative jurisdictional cases, the concept that such jurisdiction was valid where a foreign corporation had "purposefully avail[ed] itself of an economic market in the forum . . . ." Id., 307. Applying that concept, the court noted that the seller had "engaged in continuous and widespread solicitation of business within [the] State." Id., 308. This activity gave the seller " 'fair warning that [its] activity subjected [it] to the' [tax] jurisdiction of [the state].' " Id.; see also id., 312 ("[w]e have, therefore, often identified 'notice' or 'fair warning' as the analytic touchstone of due process nexus analysis"). In this regard, the record indicated that the seller solicited business in North Dakota through catalogs and flyers, advertisements in national periodicals, and telephone calls. It made approximately $1 million in sales to approximately 3000 North Dakota customers, making all deliveries by mail or common carrier from out-of-state. Id., 302. In addition, the court noted with approval the state's assertion that it had provided the following benefits to the seller: it had created an economic climate that had fostered demand for the seller's products; it maintained a legal infrastructure that protected that market; and it disposed of twenty-four tons of catalogs and flyers mailed into the state by the seller every year. Id., 304. On this record, the court concluded that "there is no question that [the seller] has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to

the benefits [the seller] receives from access to the State. We therefore agree with the North Dakota Supreme Court's conclusion that the Due Process Clause does not bar enforcement of that State's use tax against [the seller]." Id., 308.[15]

In light of this development in the law of due process and taxation, the question in the present case becomes whether the contacts between the testamentary trusts and Connecticut are sufficient constitutionally for Connecticut to treat the trusts as if they were domiciliaries of the state and, therefore, for Connecticut to tax the undistributed income of the trusts. We conclude that they are.

It is well established that a state may tax all of the income of one of its domiciliaries, irrespective of the source of that income, geographical or otherwise. Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 462-63, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995) (applying "well-established principle of interstate and international taxation—namely, that a jurisdiction, such as Oklahoma, may tax *all* of the income of its residents, even income earned outside the taxing jurisdiction" [emphasis in original]). Indeed, the court noted that "[t]his general princip[e] . . . ha[s] international acceptance. American Law Institute, Federal Income Tax Project: International Aspects of United States Income Taxation 4, 6 (1987) . . ." (Citation omitted; internal quotation marks omitted.) Oklahoma Tax Commission v. Chickasaw Nation, supra, 463.[16]

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[15] In part IV of its opinion, however, the majority of the United States Supreme Court held that, for purposes of the application of the commerce clause to the duty to collect and pay a sales tax, the "bright line" rule requiring a physical presence in the taxing state would still be required. Quill Corp. v. North Dakota, supra, 504 U.S. 309-20.

[16] We recognize, as the plaintiff points out, that in 1982, Justice O'Connor in her dissent in ASARCO, Inc. v. Idaho State Tax

Traditionally, the due process justification for permiting a domiciliary to be taxed on his or her income, irrespective of its source, is based upon the fact that the domiciliary state, by virtue of its legal system, provides the social structure pursuant to which the domiciliary receives and enjoys that income. Taxation of a domiciliary "is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship." New York ex rel. Cohn v. Graves, 300 U.S. 308, 313, 57 S. Ct. 466, 81 L. Ed. 666 (1937); id., 316 (state may tax domiciliary on rental income from real property located outside state, and on interest income from bonds located and secured by mortgages on property outside state); Lawrence v. State Tax Commission, 286 U.S. 276, 281, 52 S. Ct. 556, 76 L. Ed. 1102 (1932) (state may tax domiciliary on income received from work performed outside state); see also Cream of Wheat Co. v. Grand Forks, 253 U.S. 325, 328-29, 40 S. Ct. 558, 64 L. Ed.

Commission, supra, 458 U.S. 346-47, predicted: "The Court thus made clear only two years ago that a State of domicile cannot expect automatically to meet the due process requirements for the taxation of investment income. As with a nondomiciliary State, a domiciliary State may tax investment income *only if it confers benefits on or affords protection to the investment activity*. Mere assertion of the arbitrary legal fiction that intangible property is located at its owner's domicile no longer suffices to repel a reluctant taxpayer's due process attack." (Emphasis added.) It is clear, however, from the Supreme Court's subsequent emphatic reassertion in Oklahoma Tax Commission v. Chickasaw Nation, supra, 515 U.S. 463, of the power of a state to tax all of the income of a domiciliary, that this prediction was inaccurate.

931 (1920) (state may tax corporation incorporated in state on value of intangible personal property located outside state).

Furthermore, on much the same reasoning, as the plaintiff suggests, the "United States Supreme Court itself has validated the proposition that the State where the trustee is located provides constitutionally significant protections, opportunities and benefits to the trust for tax purposes." See Greenough v. Tax Assessors, 331 U.S. 486, 488, 67 S. Ct. 1400, 91 L. Ed. 1621 (1947) (Rhode Island municipality permitted to impose proportional ad valorem tax on out-of-state trust based solely on fact that one of two trustees resided in Rhode Island, even though trust property maintained in New York, trust beneficiary domiciled in New York, and Rhode Island trustee did not exercise trust powers in Rhode Island). The court's reasoning was that the state was entitled to treat the resident trustee like one of its individual domiciliaries, in the sense of exacting from it a tax because of the benefits and protections that its legal system provided to it. Id., 496. "A resident trustee of a foreign trust would be entitled to the same advantages from Rhode Island laws as would any natural person there resident." Id., 495. "Rhode Island has imposed this tax, it may be presumed, for the general advantages of living within the jurisdiction." (Internal quotation marks omitted.) Id., 499 (Frankfurter, J., concurring).

Thus, in the present case, as the plaintiff does not dispute, if the trustee was located in Connecticut, this state could tax the trust's undistributed income consistent with due process of law, even though, for example, the trustee in fact made all of its investment decisions, and kept the actual cash and securities of the trust in accounts in a New York office. The reason for this is that, by virtue of

its legal system, Connecticut would be providing the legal benefits and protections that enabled the trustee to perform its functions.

Similarly, the plaintiff suggests that the state where the trust is administered constitutionally may tax the income of the trust "because the State provides the locale for the bookkeeping, accounts and other instruments of trust income and investment." See, e.g., Pabst v. Wisconsin Dept. of Taxation, 19 Wis. 2d 313, 329, 120 N.W.2d 77 (1963) (sufficient nexus for taxation of income of trust where "the trust's business was transacted [in the taxing state] during the [taxing] period in question"). Thus, in the present case, if the trustee, although located in New York, had a trust administration office in Connecticut where it kept the trusts' accounts and made their investment decisions, Connecticut could tax the trusts' undistributed income. Presumably the same rationale would justify the imposition of that tax in light of the legal benefits and protections provided by the state to the process of trust administration.

Admittedly, neither the trustee, its function of administering the trusts, nor the tangible evidence of the trusts' intangible assets—the "cash" and the actual security certificates [17]—is located in Connecticut. This state, however,

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[17] The plaintiff asserts, and it is undisputed for purposes of this case, that the intangible assets of the trusts were "located" in New York, that is, were in accounts of the plaintiff in New York. Of course, although there may well be actual, physical certificates of securities owned by the trusts sitting in a vault somewhere in New York, the same certainly cannot be said of the "cash." That undoubtedly consists only of an entry on the books of the plaintiff in its commercial banking, not its trustee's capacity, and a corresponding legal obligation on the plaintiff as trustee to pay the amount of that entry upon proper order. We note this only to underscore the ephemeral quality of the physical location of intangible assets that the plaintiff asserts as one of the outer limits of a state's income taxing power under the due process clause.

by virtue of its legislative scheme, in effect has taken the practical position of treating the seats of the trusts—where they were established, and where their principal legal protections and benefits have been and are provided—as domiciliaries of the state. In passing on the constitutionality of a tax, "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." (Internal quotation marks omitted.) Wisconsin v. J. C. Penney Co., supra, 311 U.S. 444. The "practical operation of the statute . . . controls constitutionality, and not the form in which a State has cast a tax." Greenough v. Tax Assessors, supra, 331 U.S. 499-500 (Frankfurter, J., concurring). For purposes of due process of law, we see nothing less compelling about the benefits and opportunities provided by Connecticut to these trusts by its legal and judicial systems than those benefits provided by states in which either the trustee or the administration of a trust might be located.

Indeed, the United States Supreme Court has recognized the analogy between a domiciliary and the seat of a trust for purposes of taxation. "For the purpose of the taxation of those resident within her borders, Rhode Island has sovereign power unembarrassed by any restriction except those that emerge from the Constitution. Whether that power is exercised wisely or unwisely is the problem of each state. It may well be that sound fiscal policy would be promoted by a tax upon trust intangibles levied only by the state that is the seat of a testamentary trust." Id., 490. "There may be matters of trust administration which can be litigated only in the courts of the state that is the seat of the trust. For example, in the case of a testamentary trust, the appointment of trustees, settlement, termination and distribution under the provisions of the trust are to be carried out, normally, in the courts of [the]

decedent's domicile." Id., 495. The court also has recognized that a trust is " 'an abstraction,' " that for purposes of taxation it "is sometimes dealt with as though it had a separate existence," and that it may, for such purposes, be dealt with as an "entity" consisting of "separate interests, the equitable interest in the res of the beneficiary and the legal interest of the trustee." Id., 493-94.

Thus, just as a state may tax all of the income of a domiciliary, irrespective of its source, because of the legal benefits and opportunities it provides that permit the beneficiary to receive and enjoy the income, so may Connecticut tax the income of these testamentary trusts because of the benefits and opportunities that it provides to them. All of the testamentary trusts were established under their respective wills because the laws of this state provide for such establishment. Blodgett v. Bridgeport City Trust Co., 115 Conn. 127, 142, 161 A. 83 (1932). The validity of a testamentary trust is normally determined by the validity of the will, which in turn is ordinarily determined by the law of the testator's domicile. R. Hendrickson & N. Silverman, Changing the Situs of a Trust (1998) § 1A.02[1]. Thus, Connecticut's laws assure the continued existence of the trusts as mechanisms for the disposition of the testators' property according to the terms of the trusts as provided by the respective wills. In addition, the original trustees and their successors were approved by the respective Probate Courts in which the wills were probated.

With respect to the Dallett Trust and the Worcester Trust specifically, from the inception of the trusts the Connecticut Probate Courts have been charged with extensive responsibilities for legal and administrative oversight. This oversight includes the specific powers and responsibilities: (1) to call the trustee to account for the

trust estate; General Statutes § 45a-98;[18] (2) to require a bond of the trustee under appropriate circumstances, even where the will excuses a bond; General Statutes § 45a-473;[19] (3) to fill a vacancy in the office of trustee

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[18] General Statutes § 45a-98 provides in relevant part: "(a) Courts of probate in their respective districts shall have the power to (1) grant administration of intestate estates of persons who have died domiciled in their districts and of intestate estates of persons not domiciled in this state which may be granted as provided by section 45a-303; (2) admit wills to probate of persons who have died domiciled in their districts or of nondomiciliaries whose wills may be proved in their districts as provided in section 45a-287; (3) except as provided in section 45a-98a or as limited by an applicable statute of limitations, determine title or rights of possession and use in and to any real, tangible or intangible property that constitutes, or may constitute, all or part of any trust, any decedent's estate, or any estate under control of a guardian or conservator, which trust or estate is otherwise subject to the jurisdiction of the Probate Court, including the rights and obligations of any beneficiary of the trust or estate and including the rights and obligations of any joint tenant with respect to survivorship property; (4) except as provided in section 45a-98a, construe the meaning and effect of any will or trust agreement if a construction is required in connection with the administration or distribution of a trust or estate otherwise subject to the jurisdiction of the Probate Court, or, with respect to an inter vivos trust, if that trust is or could be subject to jurisdiction of the court for an accounting pursuant to section 45a-175, provided such an accounting need not be required; (5) except as provided in section 45a-98a, apply the doctrine of cy pres or approximation; (6) to the extent provided for in section 45a-175, call executors, administrators, trustees, guardians, conservators, persons appointed to sell the land of minors, and attorneys-in-fact acting under powers of attorney created in accordance with section 45a-562, to account concerning the estates entrusted to their charge; and (7) make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the laws of this state. . . ."

[19] General Statutes § 45a-473 provides: "When a testator has appointed a trustee to execute a trust created by his will, the court of probate having jurisdiction of the settlement of his estate shall, unless otherwise provided in the will, require of such trustee a probate bond. If any trustee refuses to give such bond,

if a trustee were to resign or decline to serve; General Statutes § 45a-474; [20] (4) to authorize the sale of real estate held by the trustee; General Statutes § 45a-164; [21]

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the refusal shall be deemed a refusal to accept or perform the duties of such trust; but the bond without surety of any public or charitable corporation or cemetery association to which any bequest or devise is made in trust shall be deemed sufficient. Whenever by any will it is provided that the trustee or trustees thereunder shall not be required to give a probate bond, or shall be required to give a bond which in the judgment of the court of probate having jurisdiction is insecure or inadequate, the court may, upon the application of any person interested, require such trustee or trustees at any time to furnish a probate bond in accordance with section 45a-139."

[20] General Statutes § 45a-474 provides: "When any person has been appointed trustee of any estate, or holds as trustee the proceeds of any estate sold, and no provision is made by law or by the instrument under which his appointment is derived for the contingency of his death or incapacity or for his refusal to accept such trust or for his resignation of such trust, or when a trust has been created by will and no trustee has been appointed in the will or when more than one trustee has been appointed and thereafter a trustee so appointed dies, becomes incapable, refuses to accept or resigns such trust, the court of probate of the district within which the estate is situated, or, when the trust has been created by will, in the district having jurisdiction of such will, may, on the happening of any such contingency, appoint some suitable person to fill such vacancy, taking from him a probate bond, unless in the case of a will it is otherwise provided therein, in which case the provisions of section 45a-473 shall apply."

[21] General Statutes § 45a-164 provides in relevant part: "(a) Upon the written application of the conservator of the estate of any person, guardian of the estate of any minor, temporary administrator, administrator or trustee appointed by the court, including a trustee of a missing person, or the executor or trustee under any will admitted to probate by the court, after such notice as the court may order and after hearing, the court may authorize the sale or mortgage of the whole or any part of, or any easement or other interest in, any real property in this state of such person, minor, missing person, deceased person or trustee, or any real property the legal title to which has been acquired by such tem-

(5) to require the trustee to render periodic accounts, to hold hearings upon interim and final accounts, to pass on the propriety of such accounts, and to make such orders as are necessary to secure the due execution of the trustee's duties; General Statutes §§ 45a-178 and 45a-179; [22] (6) upon the allowance of interim and final accounts, to determine the rights of the trustee and the interested parties; General Statutes §§ 45a-175 through 45a-177; [23] and

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porary administrator, administrator, executor or trustee, if the court finds it would be for the best interests of the parties in interest to grant the application. . . ."

[22] General Statutes § 45a-178 provides: "The Court of Probate shall direct what notice, if any, shall be given to the parties in interest of the filing of any account described in section 45a-177, and of the hearing thereon, and may adjust and allow the account. The court may make any order necessary and proper to secure the execution of the duties of such fiduciary, subject to appeal as in other cases."

General Statutes § 45a-179 provides: "(a) When a conservator, guardian, trustee in insolvency or trustee of a testamentary trust exhibits his final account to the Court of Probate for allowance, the court shall appoint a time and place for a hearing on the account and shall cause notice of the hearing to be given as it directs. Such fiduciary shall swear or affirm under oath to the truth of the account.

"(b) The court shall, before approving a final account of an executor or administrator, hold a hearing thereon for which notice may be given as the court shall direct, unless all parties interested in the estate sign and file in court a written waiver of such notice."

[23] General Statutes § 45a-175 provides: "(a) Courts of probate shall have jurisdiction of the interim and final accounts of testamentary trustees, trustees appointed by the courts of probate, conservators, guardians, persons appointed by probate courts to sell the land of minors, executors, administrators and trustees in insolvency, and, to the extent provided for in this section, shall have jurisdiction of accounts of the actions of trustees of inter vivos trusts and attorneys-in-fact acting under powers of attorney.

"(b) A trustee or settlor of an inter vivos trust or an attorney-in-fact or the successor of the trustee, settlor or attorneys-in-fact

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or the grantor of such power of attorney or his legal representative may make application to the court of probate for the district where the trustee, or any one of them, or the attorney-in-fact has any place of business or to the court of probate for the district where the trustee or any one of them or the settlor or the attorney-in-fact or the grantor of the power resides or, in the case of a deceased settlor or grantor, to the court of probate having jurisdiction over the estate of the settlor or grantor or for the district in which the settlor or grantor resided immediately prior to death for submission to the jurisdiction of the court of an account for allowance of the trustee's or attorney's actions under such trust or power.

"(c)(1) Any beneficiary of an inter vivos trust may petition a court of probate having jurisdiction under this section for an accounting by the trustee or trustees. The court may, after hearing with notice to all interested parties, grant the petition and require an accounting for such periods of time as it determines are reasonable and necessary on finding that: (A) The beneficiary has an interest in the trust sufficient to entitle him to an accounting, (B) cause has been shown that an accounting is necessary, and (C) the petition is not for the purpose of harassment.

"(2) A court of probate shall have jurisdiction to require an accounting under subdivision (1) of subsection (c) of this section if (A) a trustee of the trust resides in its district, (B) in the case of a corporate trustee, the trustee has any place of business in the district, (C) any of the trust assets are maintained or evidences of intangible property of the trust are situated in the district, or (D) the settlor resides in the district or, in the case of a deceased settlor, resided in the district immediately prior to death.

"(3) As used in subdivision (1) of subsection (c) of this section, 'beneficiary' means any person currently receiving payments of income or principal from the trust, or who may be entitled to receive income or principal or both from the trust at some future date, or the legal representative of such person.

"(d) The action to submit an accounting to the court, whether by an inter vivos trustee or attorney acting under a power of attorney or whether pursuant to petition of another party, shall not subject the trust or the power of attorney to the continuing jurisdiction of the Probate Court.

"(e) If the court finds such appointment to be necessary and in the best interests of the estate, the court upon its own motion may

appoint an auditor to be selected from a list provided by the Probate Court Administrator, to examine accounts over which the court has jurisdiction under this section, except those accounts on matters in which the fiduciary or cofiduciary is a corporation having trust powers. The Probate Court Administrator shall promulgate regulations in accordance with section 45a-77 concerning the compilation of a list of qualified auditors. Costs of the audit may be charged to the fiduciary, any party in interest and the estate, in such proportion as the court shall direct if the court finds such charge to be equitable. Any such share may be paid from the fund established under section 45a-82, subject to the approval of the Probate Court Administrator, if it is determined that the person obligated to pay such share is unable to pay or to charge such amount to the estate would cause undue hardship.

"(f) Upon the allowance of any such account, the court shall determine the rights of the fiduciaries or the attorney-in-fact rendering the account and of the parties interested in the account, subject to appeal as in other cases. The court shall cause notice of the hearing on the account to be given in such manner and to such parties as it directs.

"(g) In any action under this section, the Probate Court shall have, in addition to powers pursuant to this section, all the powers available to a judge of the Superior Court at law and in equity pertaining to matters under this section."

General Statutes § 45a-176 provides: "Except when any beneficiary is a trustee of a testamentary or inter vivos trust, if any fiduciary of a decedent's estate is one of the beneficiaries of the residue of the estate, and if all dispositions, if any, to other beneficiaries are bequests of specific personal property or of an amount certain or devises of specific real property, any fiduciary may, in lieu of any other accounting required under this chapter, file with the court of probate having jurisdiction of the estate a statement under the penalties of false statement that all debts, funeral expenses, taxes and expenses of administration have been paid, and all bequests and devices have been or will be distributed. The statement shall include the total of any amount reported on the return of claims filed under section 45a-397, an itemized list of all funeral expenses, taxes and expenses of administration, and a representation that all distributees have received a copy of the statement. Any distributee or other interested party not satisfied with the adequacy or content of the statement may request the filing of an account under section 45a-175 or object to the statement by petitioning the court for a hearing at any time prior to the court's

(7) to make appropriate orders regarding the distribution of the trust assets upon its termination. General Statutes

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approval of the statement. The court may, for cause shown, refuse to accept the statement and require an accounting from the fiduciary. The court of probate may enter a decree releasing and discharging the fiduciary and the sureties on his bond, if any, from any further liability."

General Statutes § 45a-177 provides: "(a) All conservators, guardians, persons appointed by the Court of Probate to sell land of minors and trustees, including those entrusted with testamentary trusts unless excused by the will creating the trust, shall render periodic accounts of their trusts under oath to the Court of Probate having jurisdiction for allowance, at least once during each three-year period and more frequently if required to do so by the will or trust instrument creating the trust. Periodic accounts for filing only may be submitted to the court at any time during each three-year period. Upon receipt of a periodic account, the court shall cause notice of it and of its availability for examination at the court to be given in such manner and to such parties as it deems reasonable. Any such party may apply to the court for a hearing on the account. If an application for such a hearing is not received by the court from a party in interest within the time stated in the notice, the periodic account will be filed without hearing thereon and without allowance or disallowance thereof, and shall not be recorded. At the end of each three-year period from the date of the last allowance of a periodic account, or upon the earlier receipt of a final account, there shall be a hearing on all periodic accounts not previously allowed, and the final account, if any, in accordance with sections 45a-178 and 45a-179.

(b) Each such periodic account shall include an inventory of the trust estate showing fully how the principal of the fund is invested and the items of income and expenditure. If there has been no change in the identity of the items comprising the principal of the fund since the last account which has been accepted and approved, it shall not be necessary to include an inventory of the trust estate.

"(c) If the estate held by any person in any such fiduciary capacity is less than two thousand dollars, or, in the case of a corporate fiduciary under the supervision of the Commissioner of Banking or any other fiduciary bonded by a surety company authorized to do business in this state, ten thousand dollars, he shall not be required to render such account unless so ordered by the court."

§§ 45a-481 through 45a-483.[24] Moreover, the exercise of

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[24] General Statutes § 45a-481 provides: "The trustee of any testamentary trust which has terminated may, unless the will creating the trust otherwise directs, after settling his final account, deliver the property remaining in his hands to the remainderman upon the order of the Probate Court, without returning the same to the estate of the decedent."

General Statutes § 45a-482 provides: "When the facts at the time of distribution from an estate to a trust or from a testamentary trust to a successive trust are such that no trust would be operative under the terms of the instrument creating such trust or successive trust because of the death of the life tenant, or because the beneficiary has reached a stipulated age, or if such trust would qualify for termination under section 45a-484, or for any other reason, the fiduciary of such estate or prior trust may distribute, with the approval of the court of probate having jurisdiction, directly from the estate or prior trust to the remaindermen of such trust, the corpus of such trust and any income earned during the period of estate administration or administration of the prior trust and distributable to such remaindermen, without the interposition of the establishment of such trust or successive trust. If distribution is based on the fact that the trust would qualify for termination under section 45a-484, reasonable notice shall be provided to all beneficiaries who are known and in being and who have vested or contingent interests in the trust."

General Statutes § 45a-483 provides: "The trustee of any trust for the benefit of any person who has been absent from his home and unheard of for seven years or more may settle his account as such trustee in the court of probate having jurisdiction thereof. Upon the order of the court, the trustee shall distribute such trust estate to the persons entitled to the remainder thereof as determined by the court, and the trustee shall not thereafter be liable to any such absent beneficiary, his heirs, executors, administrators or assigns in any action for such trust estate or any interest therein or income thereof. A person shall not be entitled to receive any portion of such estate from the trustee until such person has filed in the court of probate a bond with surety to the acceptance of the court, payable to the state, conditioned to return such trust estate to the trustee or his successor on the reappearance of the person presumed to be dead within thirteen years from the date of such order authorizing distribution. After the expiration of such thirteen-year period, such person entitled to the remainder shall not be

these powers and responsibilities benefits both beneficiaries and trustees alike. It benefits the beneficiaries because: the probate courts serve as the repository of the documents that define the beneficiaries' rights and that detail how their financial interests are being managed; the probate courts give legal effect to those documents and oversee those rights and interests; and those courts remain open and available to ensure that the beneficiaries' rights are being protected. It benefits the trustee because it provides the legal cloak of approval that helps to shield the trustee from later claims of mismanagement or other misconduct. Thus, submission of accounts and any other matters of trust administration to, and approval by, the probate court gives the trustee the assurance that its administration of the trust will not be successfully challenged at a later time.

With respect to the Parry Trust and the Stewart Trust, the wills establishing those trusts excused the trustee from rendering periodic accounts. This privilege, however, was afforded by § 45a-177. Furthermore, the final and only account of the Stewart Trust was approved by the Probate Court, thus affording the beneficiaries the legal assurance that their rights had been protected adequately throughout the administration of the trust and that the trust assets had been distributed properly, and affording the trustee the legal assurance that its administration would not be challenged later. Similarly, when the Parry Trust terminates, the trustees will be required to file a final account, which upon approval will afford the beneficiaries and the trustee the same assurances. In addition, with respect to

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liable to any such absent beneficiary, his heirs, executors, administrators or assigns in any action for such trust estate or any interest therein or income thereof."

both trusts, if at any time any beneficiary wishes or wished to question the administration of the trust by the trustee, the Probate Court would be open and available for that purpose. See 4 G. Wilhelm & R. Folsom, Connecticut Estate Practice, Jurisdiction and Procedure (1983) § 54, p. 162 and § 59, p. 177.

We conclude that this panoply of legal benefits and opportunities is comparable to those general legal benefits and opportunities that justify the imposition of taxes on the income of individual domiciliaries of the state. Just as the vitality of the trust as an economic entity is inextricably intertwined with the administration of the trust assets by a trustee located in New York, the viability of the trust as a legal entity is inextricably intertwined with the benefits and opportunities provided by the legal and judicial systems of Connecticut, and its legal viability is inextricably intertwined with its economic vitality. Neither its economic vitality nor its legal viability trumps the other for purposes of due process and taxation. These contacts with Connecticut are sufficiently "fiscal" in nature to satisfy the due process clause, and gave the testamentary trusts fair warning that they were subject to its tax jurisdiction.

This conclusion is consistent with that of the only court that has considered this precise question since Quill Corp. v. North Dakota, supra, 504 U.S. 298, was decided. In District of Columbia v. Chase Manhattan Bank, 689 A.2d 539, 540 (D.C. App. 1997), the District of Columbia Court of Appeals held that "the District of Columbia, consistent with the Due Process Clause, [may] tax the annual net income of a testamentary trust created by the will of an individual who died while domiciled in the District, when the trustee, trust assets, and trust beneficiaries are all presently located outside the District." We

agree with that court's reasoning that "the relationship between the [state] and the testamentary trust of one of its residents is sufficiently close to justify the [state's] classification of the trust itself as a resident for purposes of taxation. A testamentary trust of a [state] resident, which has been probated in the courts of the [state], has a relationship to the [state] distinct from the relationship, if any, between the [state] and the trustee or trust assets. The [state's] unquestioned power to resolve disputes over the trust and to order accountings to protect the trust corpus and beneficiaries from potential malfeasance by the trustee reflects the [state's] justifiable, though not necessarily exclusive, jurisdiction over the trust itself. One commentator has characterized this authority as follows: 'Under the "trust entity" theory, a testamentary trust is established and remains at the testator's domicile, thereby giving the domiciliary court in rem jurisdiction independent and apart from the presence of the trustee, the trust assets or the trust beneficiaries.' [G. Bogert, Trusts (6th Ed. 1987) § 177, p. 686]." District of Columbia v. Chase Manhattan Bank, supra, 544; see also First National Bank of Boston v. Harvey, 111 Vt. 281, 297, 16 A.2d 184 (1940) (due process of law does not preclude state from taxing income of testamentary trust of domiciliary of state). We disagree, moreover, with the cases decided prior to Quill Corp. that have reached a contrary conclusion. See Augusta v. Kimball, 91 Me. 605, 40 A. 666 (1898); In re Swift v. Director of Revenue, 727 S.W.2d 880 (Mo. 1987); Pennoyer v. Taxation Division Director, 5 N.J. Tax 386 (1983); Taylor v. State Tax Commission, 85 App.Div.2d 821, 445 N.Y.S.2d 648 (1981).

We also disagree with the plaintiff's contention that, because Quill Corp. involved the collection and payment of a sales tax and the present case involves an income

tax, Quill Corp. is irrelevant to this case. First, in restating the second part of the two part test for measuring the limitations on taxation imposed by the due process clause, the court in Quill Corp. itself referred to the requirement "that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State . . . ." (Citation omitted; internal quotation marks omitted.) Quill Corp. v. North Dakota, supra, 504 U.S. 306. Thus, the reference to "income" in the context of a sales tax case suggests that the court, in borrowing the adjudicative jurisdictional due process analytic rubric, did not intend to confine that analytic model to sales taxes. Second, the reasoning of Quill Corp. does not suggest that the comparable reasoning that it employed—between due process for adjudicative purposes and due process for tax purposes—was confined only to the sales tax context. Although the application of the test may yield different results depending on the type of tax to which it is applied, we can perceive no reason why the fundamental due process test itself should vary depending on the type of tax involved. Indeed, Justice Scalia in his concurrence in Quill Corp. stated that, although he did not understand the court to have held that "the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are necessarily identical"; id., 319-20; "[i]t is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax." Id., 319 (Scalia, J., concurring).

The plaintiff also argues that implicit in the due process test for taxation are the requirements "that the benefits provided by the State seeking to tax be contemporaneous with the imposition of the tax," and that there be a nexus between the benefits provided by the state and "the earning of the income which is the subject of the taxa-

tion." To the extent that the first of these implicit requirements, namely, contemporaneity, suggests that the benefits be more than historical, we agree. We think that it is implicit in the due process test that the benefits afforded by the state to a domiciliary, or its functional equivalent, justifying the taxation of its income, must generally span the time period during which the income was earned, and not solely antedate that time period without any continuing effect. The panoply of benefits afforded in the present case, however, amply meets that test. To the extent, however, that the plaintiff suggests that the benefits afforded by the state be related directly to the earning of the income—in the sense of being specifically economic or fiscal benefits—we disagree with the plaintiff. The general legal and social benefits afforded to a domiciliary that justify a state's taxation of a domiciliary's income are no more specifically economic or fiscal than those afforded by the state to the testamentary trusts involved in the present case.

The same reasoning applies to the plaintiff's contention that a "State that seeks to treat a taxpayer as a domiciliary for tax purposes, and to impose an unapportioned income tax upon all of the taxpayer's income, as Connecticut does in this case, must show greater 'fiscally' relevant contacts than a State that seeks to tax only a discrete portion of the taxpayer's income." Having legitimately chosen to treat these testamentary trusts as if they were domiciliaries for tax purposes, and having established sufficient minimum contacts with them to do so consistent with due process of law, the state also was entitled to tax all of their income, wherever generated, like that of other domiciliaries. We see nothing either in precedent or policy that requires more contacts for a resident trust than for an individual domiciliary.

B The Inter Vivos Trust

The plaintiff claims that the taxability of the undistributed income of the inter vivos trust violates the due process clause because: (1) the decision of the United States Supreme Court in Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83, 50 S. Ct. 59, 74 L. Ed. 180 (1929), is still good law and controls this issue; and (2) the residence of the beneficiary does not satisfy the due process requirement that the taxpayer's taxable activity purposefully be directed at the taxing state. Although this is a closer case than that with respect to the testamentary trusts, we conclude that the state's taxation scheme of the undistributed income of the inter vivos trust satisfies the due process clause.

The same fundamental test applies to the inter vivos test that applied to the testamentary trusts: whether "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." (Internal quotation marks omitted.) ASARCO, Inc. v. Idaho State Tax Commission, supra, 458 U.S. 315. There must be some "definite link, some minimum connection between" the state and the income that it seeks to tax. Quill Corp. v. North Dakota, supra, 504 U.S. 306.

In the present case, the critical link to the undistributed income sought to be taxed is the fact that the noncontingent beneficiary of the inter vivos trust during the tax year in question was a Connecticut domiciliary. The accumulated income eventually will be paid either outright to her when she reaches the age of forty-eight or, if she does not live that long, according to the exercise of her testamentary power of appointment or, in default of such exercise, to her then living descendants. Thus, during the

tax year of 1993, as a Connecticut domiciliary she enjoyed all of the protections and benefits afforded to other domiciliaries. Her right to the eventual receipt and enjoyment of the accumulated income was, and so long as she is such a domiciliary will continue to be, protected by the laws of the state. We conclude that, just as a state may tax all of the present income of a domiciliary, irrespective of its place or origin or the nature of its source, a state may, on the basis of the same justification, tax the income of an inter vivos trust that is accumulated for the ultimate benefit of a noncontingent domiciliary, and that is subject to her ultimate power of disposition. Although the connection is more attenuated than in the case of a testamentary trust, it is sufficient for purposes of due process of law. Furthermore, just as the state may tax the undistributed income of a trust based on the presence of the trustee in the state because it gives the trustee the protection and benefits of its laws; see Greenough v. Tax Assessors, supra, 331 U.S. 496; it may tax the same income based on the domicile of the sole noncontingent beneficiary because it gives her the same protections and benefits. In both instances, the state has given something for which it can ask return, and there is a definite and sufficient link between the contact with the state and the income sought to be taxed.

This conclusion is consistent with the decision of the California Supreme Court in a closely analogous case. In McCulloch v. Franchise Tax Board, 61 Cal. 2d 186, 189-90, 390 P.2d 412, 37 Cal. Rptr. 636, appeal dismissed, 379 U.S. 133, 85 S. Ct. 278, 13 L. Ed. 2d 333 (1964), the court upheld, against a due process challenge, California's taxation of the undistributed income of an out-of-state testamentary trust based solely on the California residence of the beneficiary of the trust. We agree with the reasoning of the California Supreme Court that "[t]he

laws of the state of residence afford benefit and protection to the resident beneficiary . . . ." Id., 195. "The tax imposed by California upon the beneficiary is constitutionally supported by a sufficient connection with, and protection afforded to, [the] plaintiff as such beneficiary. [The] [p]laintiff in the instant case has, in his role as beneficiary during the years of his residence in this state, enjoyed the protection accorded by California for his eventual receipt of these assets. California grants the beneficiary the interim protection of its laws so that he may ultimately obtain the benefit of the accumulated income. . . . [The] [p]laintiff's residence here confers the essential minimum connection . . . necessary for due process of law." (Citations omitted; internal quotation marks omitted.) Id., 196-97.[25]

We are not persuaded that, as the plaintiff asserts, the holding of Safe Deposit & Trust Co. v. Virginia, supra, 280 U.S. 83, is still good law. In that case, a Virginia domiciliary had created an inter vivos trust of intangible personalty—stocks and bonds—of which a Maryland bank was trustee, and the stock and bond certificates were located in Maryland. The beneficiaries, however, were Virginia domiciliaries. Id., 89-90. The court held that the due process clause prohibited Virginia from imposing an ad valorem tax on the value of the intangibles the evidence of which was located in Maryland. Id., 93. The court reasoned that "intangibles—stocks, [and] bonds—in the hands of the holder of the legal title with definite

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[25] We disagree, therefore, with the reasoning of those cases relied on by the plaintiff in which courts have found the domicile of a beneficiary of an inter vivos trust insufficient for due process purposes. See Blue v. Dept. of Treasury, 185 Mich. App. 406, 462 N.W.2d 762 (1990); Potter v. Taxation Division Director, 5 N.J. Tax 399 (1988). Mercantile-Safe Deposit & Trust Co. v. Murphy, 15 N.Y.2d 579, 203 N.E.2d 490, 255 N.Y.S.2d 96 (1964).

taxable situs at its residence, not subject to change by the equitable owner, may [not] be taxed at the latter's domicile in another State." Id.

Central to the court's reasoning in Safe Deposit & Trust Co., however, was the notion that the "adoption of a contrary rule would involve possibilities of an extremely serious character by permitting double taxation, both unjust and oppressive." (Internal quotation marks omitted.) Id. That notion is no longer viable. The risk of double taxation of intangibles has long been abandoned as a limitation on taxation under the due process clause. Curry v. McCanless, 307 U.S. 357, 363, 59 S. Ct. 900, 83 L. Ed. 1339 (1939). Furthermore, the Supreme Court has affirmed that a domiciliary of a state who is a beneficiary of an out-of-state trust may be taxed on the trust income received by her, even though the other state also taxed the value of the trust property that generated the income, and in doing so the court specifically distinguished Safe Deposit & Trust Co. See Guaranty Trust Co. v. Virginia, 305 U.S. 19, 22 and n.1, 59 S. Ct. 1, 83 L. Ed. 16 (1938). Indeed, in their treatise on state taxation, Professors Jerome Hellerstein and Walter Hellerstein stated: "It is unlikely that the Supreme Court would now hold, on the weakened authority of the Safe Deposit & Trust case and under the later Due Process Clause cases, that the Due Process Clause bars the State of a resident trust or estate from taxing a nonresident trustee on income accumulated by the trust from intangibles held by the trustee who resides outside the State and administers the trust there." 2 J. Hellerstein & W. Hellerstein, State Taxation (1992) ¶ 20.09[2], p. 20-68.

We also are not persuaded by the plaintiff's contention that the absence of conduct constituting "purposeful direction" at Connecticut is fatal to the state's power to tax

the undistributed income of the inter vivos trust in the present case. It is true that, in Quill Corp. v. North Dakota, supra, 504 U.S. 307, as the plaintiff argues, the Supreme Court held that the out-of-state mail order seller's purposeful conduct toward the North Dakota market was a sufficient due process surrogate for a physical presence in North Dakota, for purposes of requiring the seller to collect and pay a sales tax. That does not mean, however, as the plaintiff's argument suggests, that such conduct is a sine qua non of due process tax analysis in all contexts. Purposeful conduct may serve to satisfy the minimum contacts requirement. So may, however, the presence in the state of a noncontingent beneficiary who receives the benefits and protections of the state's laws. McCulloch v. Franchise Tax Board, supra, 61 Cal. 2d 195.

II THE COMMERCE CLAUSE

The plaintiff claims that the taxation scheme applied to the testamentary trusts and the inter vivos trust in the present case violates the commerce clause of the constitution because: (1) there is an undue risk of systematic, multiple taxation on the income of the trusts; and (2) Connecticut does not provide a tax credit for any taxes paid to any other state by the trusts. We disagree.

We first consider, and reject, the defendant's argument that the commerce clause does not apply because the trusts are not engaged in interstate commerce. In this respect, the entities that are affected by the state taxing scheme are in-state banks and out-of-state banks that provide financial services to trusts as trustees. Although there is nothing in this record to indicate the degree of competition between the two groups, it is fair to assume, in this economy, that they may be actual or prospective competitors to provide such services to the Connecticut

market for them. See General Motors Corp. v. Tracy, 519 U.S. 278, 300, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997) (presence of actual or prospective competition between supposedly favored and disfavored entities in single market determines applicability of commerce clause).

We next address whether, as the plaintiff contends, there is no credit available to resident trusts, like those in the present case, for income taxes paid to another taxing state, or whether, as the defendant suggests, a credit is available to these trusts. The question of the availability of a credit is significant because, to the extent that such a credit is available, the risk of multiple taxation is eliminated. We conclude that such a credit generally is available under the tax statutes and regulations, but that it only extends to taxes paid on income derived from real or tangible personal property, or from a business, trade, occupation or profession, and does not extend to taxes paid on income derived from intangible personalty, such as dividends, interest and capital gains from the sale of securities.[26] Therefore, because the property of all of

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[26] General Statutes § 12-704(a) provides in relevant part: "Any resident or part-year resident of this state shall be allowed a credit against the tax otherwise due under this chapter in the amount of any income tax imposed on such resident or part-year resident for the taxable year by another state of the United States . . . on income derived from sources therein and which is also subject to tax under this chapter. . . ." (Emphasis added.)

Although the statutes do not specifically define the term "income derived from sources therein," they do, throughout, use the analogous term "sources within this state"; (emphasis added); see, e.g., General Statutes § 12-700(b)(1) ("[t]here is hereby imposed on the Connecticut taxable income derived from or connected with sources within this state"); and that term is defined as follows: "Items of income, gain, loss and deduction derived from or connected with sources within this state shall be those items attributable to: (A) The ownership or disposition of any interest in real or tangible personal property in this state; or (B) a business, trade, profession or occupation carried on in this state; or (C) in the case

these trusts consisted only of cash and securities in the tax year in question, no credit would have been available to them under the current tax scheme.[27]

The so-called "dormant commerce clause" refers, not to the affirmative grant to Congress to "regulate Commerce with foreign Nations, and among the Several States"; U.S.

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of a shareholder of an S corporation, the ownership of shares issued by such corporation, to the extent determined under section 12-712." General Statutes § 12-711(b)(1). Furthermore, "[i]ncome from intangible personal property, including annuities, dividends, interest and gains from the disposition of intangible personal property, shall constitute income derived from sources within this state only to the extent that such income is from property employed in a business, trade, profession or occupation carried on in this state." General Statutes § 12-711(b)(2).

The defendant has, by regulation, provided that: " 'Income derived from or connected with sources within a qualifying jurisdiction' is to be construed so as to accord with the definition of the term 'derived from or connected with sources within this state' set forth in Part II in relation to the adjusted gross income of a nonresident individual. Thus, the credit against Connecticut income tax is allowed for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction. . . ." Regs., Conn. State Agencies § 12-704(a)-4 (3). Moreover, the defendant has, by regulation, also provided that a resident trust or estate is entitled to the same credit that would be available to an individual resident of Connecticut. Regs., Conn. State Agencies § 12-704(a)-1. Thus, as the plaintiff maintains, so-called "source income," whether in-state or out-of-state, ordinarily does not include interest and dividend income, or capital gains from the sale of securities. Therefore, the trusts involved in the present case, although not in fact taxable on their income by any other jurisdiction, would not have been entitled to a credit for such tax if they had been so taxed.

[27] It is also true, however, that, to the extent that any trust invested in real or tangible personal property, or in a trade, business or profession, located in this state, the taxes paid to another state on the income generated thereby would be available for a tax credit in Connecticut.

Const., art. I, § 8; but to the clause's "negative sweep . . . . The Clause, in Justice Stone's phrasing, 'by its own force' prohibits certain state actions that interfere with interstate commerce." Quill Corp. v. North Dakota, supra, 504 U.S. 309. In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), the United States Supreme Court developed a four part test for measuring state taxes against a dormant commerce clause challenge. "[W]e will sustain a tax against a Commerce Clause challenge so long as the 'tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.' [Id., 279]." Quill Corp. v. North Dakota, supra, 311. This test emphasizes "the importance of looking past the formal language of the tax statute [to] its practical effect . . . ." (Citation omitted; internal quotation marks omitted.) Id., 310.

The plaintiff does not focus on any one part of this test. Instead, it argues that "a critical principle that animates [the Complete Auto Transit, Inc. test]" is that it "is intended to preserve the long-standing prohibition against any State tax that subjects interstate commerce to a risk of systematic, multiple taxation." Specifically, with respect to the testamentary trusts, the plaintiff contends that testators will have an incentive to appoint only Connecticut trustees because appointing a trustee in another state "necessarily subjects the testamentary trust to the risk of a second income tax in that State." Thus, the plaintiff argues, this incentive "unconstitutionally promotes in-state trustees by subjecting trusts administered by out-of-state trustees to a risk of multiple taxation." With respect to the inter vivos trust, the plaintiff contends that this risk is compounded because, in addition to the risk of an additional income tax in the state of residence of the

trustee, "the presence of [other] such out-of-state [noncontingent] beneficiaries increases the risk of multiple taxation even further." [28] Although we agree that there are such incentives and risks, we conclude that they are too remote and speculative to constitute a dormant commerce clause violation.

The plaintiff concedes that not all risks of multiple taxation run afoul of the dormant commerce clause, because it is not the purpose of the clause to relieve those engaged in interstate commerce from bearing their fair share of state tax burdens. Complete Auto Transit, Inc. v. Brady, supra, 430 U.S. 279. The plaintiff contends, however, that the incentive for Connecticut testators and settlors to select Connecticut trustees over out-of-state trustees because of the risk of multiple taxation in cases in which out-of-state trustees are selected, discriminates against interstate commerce by putting that commerce "into an inferior position to local commerce." We are not persuaded.

In our view, this assertion rests on an assumption about how Connecticut testators of testamentary trusts and settlors of inter vivos trusts are likely to select their trustees that rests on little more than speculation. First, as we indicated previously, although any resident trust would not be entitled to a credit for income taxes paid to another state based on the trust's income derived from intangibles, it would be entitled to such a credit for such taxes derived from real estate or tangible personal property. Thus, it is only the trust income derived from in-

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[28] We note, however, in this regard, that the presence in other states of noncontingent beneficiaries does not increase the amount of the taxes imposed by Connecticut, which are calculated only proportionally to the number of Connecticut noncontingent beneficiaries. Thus, any risk of multiple taxation would be ameliorated by the tax load being spread among the states in which the noncontingent beneficiaries were domiciled.

tangibles, not all potential trust income, that does not qualify for such a credit. Second, the purported testator or settlor also would have to be unwilling to admit of any significant degree of probability that the other taxing state would not provide, in its taxing scheme, a credit for taxes paid to Connecticut by the trust. Third, a testator or settlor sophisticated enough to envision the risk of future multiple taxation by a state of a nonresident trustee also would likely be sophisticated enough to realize that, even if a local bank originally was named as trustee, there would be no guarantee that the bank's trust operation would remain local, given the history of mergers and acquisitions in the financial services industry.

Thus, the plaintiff's position rests on the assumption that, despite all of these uncertainties, a Connecticut testator or settlor would choose a Connecticut bank over an out-of-state bank, as trustee solely because of the potential for future multiple taxation of some portion of the trust's future income. The choice of bank as trustee is likely to be animated by many imponderables, among them: the prior experience of the testator or settlor; the financial performance of the various banks in the pool of available choices; the current location of the likely beneficiaries; the current location of the various banks in the pool; and, of course, the tax implications, if any. We simply are not sufficiently persuaded of the underlying validity of the plaintiff's assumption about how such a multifaceted decision as the choice of a trustee is likely to be made.

The observations of the United States Supreme Court, in a recent case involving the application of the dormant commerce clause, are appropriate to the present case. In attempting to assess the likely effects of the regulatory scheme at issue there, the court stated: "The degree to which these very general suggestions might prove right or

wrong, however, is not really significant; the point is simply that all of them are nothing more than suggestions, pointedly couched in terms of assumption or supposition. This is necessarily so, simply because the Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them. . . . [S]ee Smith, State Discriminations Against Interstate Commerce, 74 Calif. L. Rev. 1203, 1211 (1986) (noting that '[e]ven expert economists' may have difficulty determining 'whether the overall economic benefits and burdens of a regulation favor local inhabitants against outsiders'). We are consequently ill qualified to develop Commerce Clause doctrine dependent on any such predictive judgments, and it behooves us to be . . . reticent about projecting the effect of applying the Commerce Clause here . . . ." (Citations omitted; internal quotation marks omitted.) General Motors Corp. v. Tracy, supra, 519 U.S. 308-309. Similarly, in the present case, we should be reticent about making predictions about the economic effects of the marginal incentives afforded by the state's taxing scheme of resident trusts. We conclude, therefore, that the incentives and risks have not been sufficiently established so as to result in a dormant commerce clause violation.

The judgment is affirmed.

In this opinion CALLAHAN, C. J., and NORCOTT, PALMER and PETERS, Js., concurred.

McDONALD, J., with whom BERDON, J., joins, dissenting. I disagree with the majority's conclusion that the imposition of Connecticut's state income tax on the entire income of the trusts does not violate due process of law or the commerce clause of the United States constitution. I would hold that Connecticut's attempt to tax the entire income, all of which was produced outside

the state of Connecticut, violates both due process and the negative implications of the commerce clause.

"The Due Process and Commerce Clauses of the [United States] Constitution . . . prevent States that impose an income-based tax on nonresidents from tax[ing] value earned outside [the taxing State's] borders." (Internal quotation marks omitted.) Barclays Bank PLC v. Franchise Tax Board of California, 512 U.S. 298, 303, 114 S. Ct. 2268, 129 L. Ed. 2d 244 (1994).

The due process clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax . . . and that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State . . . ." (Citations omitted; internal quotation marks omitted.) Quill Corp. v. North Dakota, 504 U.S. 298, 306, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). In establishing the minimum connection between Connecticut and these trusts, the majority focuses on the fact that the settlors of the trusts resided in Connecticut at the time the trusts were created, and that Connecticut offers some benefits and opportunities to the trusts. The majority relies on the fact that the probate courts of this state "serve as the repository of the documents that define the beneficiaries' rights . . . give legal effect to those documents and oversee [the beneficiaries'] rights and interests . . . remain open and available to ensure that the beneficiaries' rights are being protected . . . [and are open for the] submission of accounts and any other matters of trust administration [which] gives the trustee the assurance that its administration of the trust will not be successfully challenged at a later time."

The majority, in sum, justifies a tax on the entire income of the trusts based on the fact that the Connecticut

probate courts are open for accounting and trust administration. Our constitution [1] requires Connecticut courts to be open to all persons, including residents of other states or countries. The fact that the courts are open and available to nonresidents hardly would justify a Connecticut income tax on all of the income of New Yorkers or Canadians, simply because they may have a case within the subject matter jurisdiction of Connecticut courts.

While the trusts were indeed created in Connecticut under Connecticut law, all of the income has been realized in the state of New York. Therefore, none of the benefits cited by the majority is fiscally relevant, and Connecticut has done nothing in the years since the creation of the trusts to foster the economic environment in which the trust income has been produced. See Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267 (1940) (taxing power exerted by state must bear "fiscal relation to protection, opportunities and benefits given by the state"). As the Court of Appeals of Michigan has stated: "We analogize the present case to a hypothetical statute authorizing that any person born in Michigan to resident parents is deemed a resident and taxable as such, no matter where they reside or earn their income. We believe this would be clearly outside the state's power to impose taxes." Blue v. Dept. of Treasury, 185 Mich. App. 406, 411, 462 N.W.2d 762 (1990). Following the majority of courts that have considered this issue, I would hold that Connecticut's attempt to tax the entire income of these trusts violates the fourteenth amendment due process clause of the United States con-

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[1] The constitution of Connecticut, article first, § 10, provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

stitution. See, e.g., id.; In re Swift, 727 S.W.2d 880, 882 (Mo. 1987); Pennoyer v. Taxation Division Director, 5 N.J. Tax 386, 399 (1983); Mercantile-Safe Deposit & Trust Co. v. Murphy, 15 N.Y.2d 579, 581, 203 N.E.2d 490, 255 N.Y.S.2d 96 (1964); Taylor v. State Tax Commission, 85 App. Div. 2d 821, 821-22, 445 N.Y.S.2d 648 (1981); see also Augusta v. Kimball, 91 Me. 605, 611, 40 A. 666 (1898). The majority claims that, in light of Quill Corp. v. North Dakota, supra, 504 U.S. 298, these earlier state decisions are no longer good law. Quill Corp., however, concerned a North Dakota use tax on mail order purchases stored, used or consumed within North Dakota, and did not address the issue of taxing trust income based upon the settlor's residence.

I also disagree with the majority's conclusion that imposing Connecticut's state income tax upon the trusts does not violate the commerce clause. The majority dismisses as speculative the plaintiff's argument that the risk of multiple taxation of the trust income violates the commerce clause and its implicit prohibition against discrimination favoring intrastate commerce. The United States Supreme Court has clearly indicated that the risk, and not only the actuality, of multiple state taxation suffices to establish such a constitutional violation. See Goldberg v. Sweet, 488 U.S. 252, 261-62, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989); see also B. Bittker, Regulation of Interstate and Foreign Commerce (1999) § 8.07, p. 8-23; 1 J. Hellerstein & W. Hellerstein, State Taxation (3d Ed. 1998) ¶ 4.08[1][a], p. 4-39. To avoid the risk of multiple taxation, taxes that affect interstate commerce must be apportioned fairly between the states with potential jurisdiction to tax. Goldberg v. Sweet, supra, 260-61 ("the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction"); B. Bittker, supra,

§ 8.08, p. 8-26 (apportionment of taxed enterprise's global value among states claiming jurisdiction to tax is "a criterion of the constitutionality of state taxes"). In Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983), Justice Brennan, speaking for the majority, stated: "The first, and . . . obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed. The second and more difficult requirement is what might be called external consistency—the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." Id., 169.

The majority approves of imposing Connecticut's state income tax on the entire trust income even though New York or some other state might also tax that income. Connecticut's income tax is not apportioned at all and there is a risk of double taxation of the trust income. I believe that the lack of any apportionment of the tax liability between states with potential jurisdiction to tax these trusts is fatal to the Connecticut taxing scheme. Furthermore, the Connecticut scheme fails to provide the trusts with any credit for taxes paid to any other state. See, e.g., Barringer v. Griffes, 1 F.3d 1331, 1336 (2d Cir. 1993) (noting importance of credits in saving tax schemes from unconstitutionality). Without any provisions for apportionment or tax credits, the Connecticut income tax on these trusts lacks internal and external consistency and violates the negative implications of the commerce clause.

For the foregoing reasons, I respectfully dissent.

APPENDIX B

SUPERIOR COURT TAX SESSION
J.D. OF HARTFORD/NEW BRITAIN
AT HARTFORD

June 17, 1997

No. CV 96-0560970 S

THE CASE [sic] MANHATTAN BANK, ELIZABETH B. PARRY and HARRISON F. DURAND, as Trustees of a Trust under the Will of Sidney L. Parry, Deceased, for the Benefit of Elizabeth B. Parry *et al*;

THE CHASE MANHATTAN BANK and DR. BERNARD L. PACELLA, as Trustees of a Trust under the Will of John Dallett, Deceased, for the Benefit of John Dallett, Jr.;

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under the Will of Elvira R. Evens, Deceased, for the Benefit of Grace Evens Stewart;

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under the Will of James N. Worcester, Deceased, for the Benefit of James N. Worcester, Jr.; and

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under Agreement dated March 16, 1955 by Charles Anderson Dana for the Benefit of Sandra Leigh Dana Adolfsson
Plaintiffs

VS.

GENE GAVIN, COMMISSIONER OF REVENUE SERVICES OF THE STATE OF CONNECTICUT,
Defendant

STIPULATED FACTS

(1) The Chase Manhattan Bank, Elizabeth B. Parry and Harrison F. Durand, as Trustees of a Trust under the Will of Sidney L. Parry, Deceased, for the benefit of Elizabeth B. Parry *et al* (the "Parry Trust");

(2) The Chase Manhattan Bank and Dr. Bernard L. Pacella, as Trustees of a Trust under the Will of John Dallett, Deceased, for the benefit of John Dallett, Jr. (the "Dallett Trust");

(3) The Chase Manhattan Bank, as sole Trustee of a Trust under the Will of Elvira R. Evens, Deceased, for the benefit of Grace Evens Stewart (the "Stewart Trust");

(4) The Chase Manhattan Bank, as sole Trustee of a Trust under the Will of James N. Worcester, Deceased, for the benefit of James N. Worcester, Jr. (the "Worcester Trust");

(5) The Chase Manhattan Bank as sole Trustee of a Trust under Agreement dated March 16, 1955 by the late Charles Anderson Dana for the benefit of Sandra Dana Adolfsson (the "Adolfsson Trust").

(collectively, the "Plaintiffs") by their attorneys White & Case and Howard, Kohn, Sprague & Fitzgerald, and Defendant Gene Gavin, Commissioner of Revenue Services of the State of Connecticut ("Defendant") by his counsel Richard Blumenthal, Attorney General of the State of Connecticut, do hereby solely for the purpose of this proceeding and for no other purpose whatsoever STIPULATE AND AGREE TO THE FOLLOWING FACTS:

EXHIBITS

1. The documents submitted in support of the Complaint dated May 20, 1996 (the "Original Complaint") and attached thereto (specifically, Exhibits A through Y, inclusive) are true and correct copies of their originals, except that the copy of John Dallett's Will attached as Exhibit F to the Original Complaint has been redacted to exclude private material not relevant to this proceeding. The Original Complaint was amended by the filing of an Amended Complaint dated December 17, 1996 (the "Amended Complaint").

PARRY TRUST

Plaintiffs

2. Plaintiffs The Chase Manhattan Bank, as successor to Manufacturers Hanover Trust Company, Elizabeth B. Parry and Harrison F. Durand have served as Trustees of the Parry Trust since its creation. No other person or entity has served as trustee.

3. Plaintiff The Chase Manhattan Bank is a banking corporation incorporated under the laws of the State of New York. The appointment of its predecessor, Manufactures [sic] Hanover Trust Company, as trustee was approved by the probate court for the district of Westport, Connecticut on December 2, 1968 pursuant to the Connecticut General Statutes.

4. Plaintiff Elizabeth B. Parry, widow of the testator, Sidney L. Parry, who created the Parry Trust, has resided in, and been a domiciliary of, the State of Florida from February of 1975 through the present. From December of 1973 through February of 1975, she was a resident and domiciliary of the State of Vermont. From 1968 through December of 1973, she was a resident and

domiciliary of the State of Connecticut. The appointment of Elizabeth B. Parry as trustee was approved by the probate court for the district of Westport, Connecticut on December 2, 1968 pursuant to the Connecticut General Statutes.

5. Plaintiff Harrison F. Durand has resided in, and been a domiciliary of, the Commonwealth of Massachusetts since 1996. At all times from 1968 to the present, Mr. Durand was and is a resident and domiciliary of the State of New Jersey. The appointment of Harrison F. Durand as trustee was approved by the probate court for the district of Westport, Connecticut on December 2, 1968 pursuant to the Connecticut General Statutes.

The Trust Instrument and Beneficiaries

6. The Parry Trust is a testamentary trust established under the Will of Sidney L. Parry, who died on November 9, 1968. The Will of Sidney L. Parry was probated in the probate court of the District of Westport, Connecticut. Sidney L. Parry died a resident and domiciliary of the State of Connecticut.

7. Under Article SIXTH of his Will, the testator, Sidney L. Parry, left a share of his residuary estate in trust to pay the income therefrom to his widow, Elizabeth B. Parry, for her life. During Elizabeth B. Parry's lifetime, the Trustees also have the discretion to distribute trust principal to her, and to distribute up to fifty percent (50%) of the income to the testator's three grandchildren by his daughter Elizabeth Jane Parry Morrow (now Elizabeth Parry Miller). These grandchildren currently include (a) Virginia Parry Miller, (b) Katherine E. Miller Ringus, and (c) Donald R. Miller.

8. Upon the death of Elizabeth B. Parry, the testator's daughter Elizabeth Parry Miller, if she is then alive, will become a beneficiary of the Parry Trust for her life.

9. The Parry Trust will terminate upon the death of the survivor of Elizabeth B. Parry and Elizabeth Parry Miller, at which time the trust assets will be distributed to the testator Sidney L. Parry's then living issue, *per stirpes*. Currently, this class of remaindermen includes the testator's three grandchildren listed in Paragraph 7 above. If the Parry Trust terminated presently, these grandchildren would receive their remainder shares outright since all are over the age of thirty-five (35) years, rendering the continuing trust provisions under Paragraph (1) of Subdivision B. of Article SIXTH inapplicable.

10. None of the aforementioned beneficiaries of the Parry Trust is, or was at any time since creation of the Parry Trust, a resident or domiciliary of the State of Connecticut.

11. The corpus of the Parry Trust consisted solely of cash and securities during its 1993 taxable year. Certain securities that were held by the Parry Trust in 1993 are listed in Exhibit A attached hereto. The cash and securities are held in an account at The Chase Manhattan Bank.

12. At no time has the Parry Trust held real estate situated in the State of Connecticut. At no time has the Parry Trust held a security interest in real or personal property situated in the State of Connecticut.

13. At no time during its 1993 taxable year did the Parry Trust earn any income that was derived from or connected with the ownership or disposition of any interest in real or tangible personal property, whether in Connecticut or elsewhere, or from a business, trade, profession or occupation carried on by the trust, whether in Connecticut or elsewhere.

14. The Trustees of the Parry Trust have been excused by Article FOURTEENTH of the Will of Sidney L. Parry from rendering, and have never rendered since its creation, periodic accounts to the court of probate having jurisdiction.

15. Conn. Gen. Stat. § 45a-177 permits a testamentary trust to excuse the trustee from rendering periodic accounts for the trust to the court of probate having jurisdiction.

16. Since creation of the Parry Trust, the trustees have held or participated in meetings in Connecticut regarding the Parry Trust in connection with this proceeding and for no other purpose. Such meetings were attended by officers of the corporate trustee and by attorneys for the trustees only.

17. Since creation of the Parry Trust, the trustees of the Parry Trust have only appeared, represented and/or participated in the proceedings before a Connecticut court on behalf of the Parry Trust in connection with (i) this proceeding and (ii) the probate proceeding relating to the Will of Sidney L. Parry, deceased in probate court for the district of Westport, Connecticut, and for no other purpose.

18. Since creation of the Parry Trust, the trustees have petitioned, filed an action, motion or otherwise sought an order, judgment or ruling by a Connecticut court only with respect to (i) this proceeding and (ii) the probate proceeding relating to the Will of Sidney L. Parry, deceased, in probate court for the district of Westport, Connecticut.

19. Since creation of the Parry Trust, the trustees have answered or otherwise responded only to motions, petitions or actions brought before a Connecticut court with

respect to (i) this proceeding and (ii) the probate proceeding relating to the Will of Sidney L. Parry, deceased, in probate court for the district of Westport, Connecticut.

Payment of Taxes

20. For the tax year 1993, the Parry Trust was credited with an estimated 1993 income tax payment to Defendant of $452.00 by its application of an overpayment of $52 made to Defendant for the tax year 1992 to the tax year 1993 and payments of $400 in estimated tax payments ($200 on 6/15/93; $100 on 9/15/93; and $100 on 1/15/94).

21. For the 1993 taxable year, the Parry Trust properly did not pay income tax to any State other than the State of Connecticut.

22. On or before December 15, 1994, the Parry Trust made a timely filing of a 1993 Connecticut Fiduciary Income Return (Form CT-1041). With the return, the Parry Trust paid Defendant $116.00 in income taxes, plus interest thereon of $11.60. This payment brought the total 1993 income taxes, plus interest, paid to Defendant by the Parry Trust to $579.60. No court other than the Connecticut probate court has exercised jurisdiction over the Parry Trust either in an administrative or judicial process.

DALLETT TRUST

Plaintiffs

23. Plaintiffs The Chase Manhattan Bank, as successor to the Chemical Bank, and Dr. Bernard L. Pacella have served as Trustees of the Dallett Trust since their appointment at its creation. No other person or entity has served as trustee.

24. Plaintiff The Chase Manhattan Bank is a banking corporation incorporated under its laws of the State of New York. The appointment of its predecessor, Chemical Bank, as trustee was approved by the probate court for the district of Westport, Connecticut on March 15, 1975 pursuant to the Connecticut General Statutes.

25. Plaintiff Dr. Bernard L. Pacella has not been a resident or domiciliary of the State of Connecticut at any time since creation of the Dallet Trust. Currently he is a resident and domiciliary of the State of New York. The appointment of Dr. Bernard L. Pacella as trustee was approved by the probate court for the district of Westport, Connecticut on March 15, 1975 pursuant to the Connecticut General Statutes.

The Trust Instrument and Beneficiaries

26. The Dallett Trust is a testamentary trust established under the Will of John Dallett, who died on April 19, 1975. The Will of John Dallett was probated in the Probate Court of the District of Westport, Connecticut. John Dallett died a resident and domiciliary of the State of Connecticut.

27. Paragraph 5 of Subdivision C of Article THIRD of John Dallett's Will governed the distribution of his residuary estate because of his wife, Mary Holland Dallett, survived him. Under its provisions, John Dallett left a share of his residuary estate in trust to pay income therefrom to his son, John Dallett, Jr., for life. In addition, the Trustees have discretion to distribute principal to John Dallett, Jr., during his life.

28. Upon the death of John Dallett, Jr., the Trustees are directed to apply the income of the Dallett Trust equally for the benefit of the children of John Dallett, Jr., until the youngest shall attain the age of twenty-three

years, at which time the trust assets will be distributed to John Dallett, Jr.'s then living children and the then living children of any deceased child. Currently, the class of remaindermen includes the only child of John Dallett, Jr., Cassandra Dallett, who is over the age of twenty-three years of age.

29. None of the aforementioned beneficiaries of the Dallett Trust is, or was at any time since creation of the Dallett Trust, a resident or domiciliary of the State of Connecticut.

Trust Administration

30. The corpus of the Dallett Trust consisted solely of cash and securities during its 1993 taxable year. Certain securities that were held by the Dallett Trust in 1993 are listed in Exhibit B attached hereto. The cash and securities were held in an account at The Chase Manhattan Bank.

31. At no time has the Dallett Trust held real estate situated in the State of Connecticut. At no time has the Dallett Trust held a security interest in real or personal property situated in the State of Connecticut.

32. At no time during its 1993 taxable year did the Dallett Trust earn any income from or connected with the ownership or disposition of any interest in real or tangible personal property, whether in Connecticut or elsewhere, or from a business, trade, profession or occupation carried on by the trust, whether in Connecticut or elsewhere.

33. Periodic accountings have been filed on behalf of the Dallett Trust in the probate court for the district of Westport, Connecticut for the following periods:

April 28, 1976	-	March 31, 1979
April 1, 1979	-	March 31, 1982
April 1, 1982	-	March 31, 1985
April 1, 1985	-	March 31, 1988
April 1, 1988	-	March 31, 1991
April 1, 1991	-	March 31, 1993

All such periodic accountings were approved by the probate court for the district of Westport, Connecticut.

34. Since creation of the Dallett Trust, the trustees have held or participated in meetings in Connecticut regarding the Dallett Trust, in connection with this proceeding and for no other purpose. Such meetings were attended by officers of the corporate trustee and by attorneys for the trustee only.

35. Since creation of the Dallett Trust, the trustees have only appeared, represented and/or participated in proceedings before a Connecticut court on behalf of the Dallett Trust in connection with (i) this proceeding, (ii) the probate proceeding relating to the Will of John Dallett, deceased, in the probate court for the district of Westport, Connecticut, and (iii) periodic accounting proceedings in the probate court for the district of Westport, Connecticut (see Paragraph 33 above), and for no other purpose.

36. Since creation of the Dallett Trust, the trustees have petitioned, filed an action, motion or otherwise sought an order, judgment or ruling by a Connecticut court only with respect to (i) this proceeding, (ii) the probate proceeding in the probate court for the district of Westport, Connecticut relating to the Will of John Dallett, deceased, and (iii) in the periodic accounting proceedings (see Paragraph 33 above).

37. Since creation of the Dallett Trust, the trustees have answered or otherwise responded only to motions,

petitions or actions brought before a Connecticut court with respect to (i) this proceeding, (ii) the probate proceeding relating to the Will of John Dallett, deceased, in the probate court for the district of Westport, Connecticut, and (iii) in the periodic accounting proceeding (see Paragraph 33 above).

38. For the 1993 taxable year, the Dallett Trust property did not pay income tax to any State other than the State of Connecticut.

39. No court other than the Connecticut probate court has exercised jurisdiction over the Dallet Trust either in an administrative or judicial process.

STEWART TRUST

Plaintiff

40. Plaintiff The Chase Manhattan Bank, as successor to Chemical Bank, served as Trustee of the Stewart Trust from its creation to its termination. No other person or entity has served as trustee.

41. Plaintiff The Chase Manhattan Bank is a banking corporation incorporated under the laws of the State of New York. The appointment of its predecessor, Chemical Bank, as trustee was approved by the probate court for the district of New Canaan, Connecticut on August 12, 1975 pursuant to the Connecticut General Statutes.

The Trust Instrument and Beneficiaries

42. The Stewart Trust was a testamentary trust established under the Will of Elvira R. Evens, who died on January 21, 1974. The Will of Elvira B. Evens was probated in the Probate Court of the District of New Canaan, Connecticut. Elvira R. Evens died a resident and domiciliary of the State of Connecticut.

43. Article SEVENTH of Elvira R. Evens's Will governed the distribution of her residuary estate because her husband, Jules G. Evens, predeceased her. Under its provision, Elvira R. Evens left a share of her residuary estate in trust to pay the income thereon to her daughter, Grace Evens Stewart, for life. In addition, the Trustee had discretion to distribute principal to Grace Evens Stewart during her life.

44. After the events relevant to this action had taken place, the Stewart Trust terminated upon the death of Grace Evens Stewart on March 13, 1995, at which time the trust assets became distributable to Grace Evens Stewart's then living issue, *per stirpes.* The remaindermen are Grace Evens Stewart's two children, Jean Burton and Donald G. Stewart, Jr.

45. At all times relevant to this action, Grace Evens Stewart was a resident of the State of Connecticut. Grace Evens Stewart died a resident and domiciliary of the State of Connecticut. One of the two remaindermen, namely Donald G. Stewart, Jr., was a resident of the State of Connecticut at the termination of the trust in 1995. The other remaindermen, Jean Burton, was not a resident and domiciliary of the State of Connecticut at the termination of the trust in 1995.

Trust Administration

46. The corpus of the Stewart Trust consisted solely of cash and securities during its 1993 taxable year. Certain securities that were held by the Stewart Trust in 1993 are listed in Exhibit C attached hereto. The cash and securities are held in an account at The Chase Manhattan Bank.

47. At no time did the Stewart Trust hold real estate situated in the State of Connecticut. At no time did the

Stewart Trust hold a security interest in real or personal property situated in the State of Connecticut.

48. At no time during 1993 did the Stewart Trust earn any income that was derived from or connected with the ownership or disposition of any interest in real or tangible personal property, whether in Connecticut or elsewhere, or from a business, trade, profession or occupation carried on by the trust, whether in Connecticut or elsewhere.

49. The Trustee of the Stewart Trust was excused by Paragraph 13 of Article ELEVENTH of the Will of Elvira R. Evens from rendering, and has never rendered between its creation and termination, periodic accounts to the court of probate having jurisdiction.

50. Conn. Gen. Stat. § 45a-177 permits a testamentary trust to excuse the trustee from rendering periodic accounts for the trust to the court of probate having jurisdiction.

51. After its termination, the Trustee of the Stewart Trust filed, as provided by Conn. Gen. Stat. § 45a-175, a first and final account for the period from July 15, 1975 to March 13, 1995 at the Probate Office in New Canaan, Connecticut, which account was settled by judicial order on February 26, 1996.

52. From creation to termination of the Stewart Trust, the trustees have held or participated in meetings in Connecticut regarding the Stewart Trust in connection with this proceeding and for no other purpose. Such meetings were attended by officers of the corporate trustee and by attorneys for the trustee only.

53. From creation to termination of the Stewart Trust, the trustees have only appeared, represented and/or participated in proceedings in a Connecticut court on behalf

of the Stewart Trust in connection with (i) this proceeding; (ii) in the probate proceedings relating to the Will of Elvira Evans [sic], deceased, in the probate court for the district of New Canaan, Connecticut; and (iii) the proceeding to settle the Final Account of the Trustee upon termination of the Stewart Trust and for no other purpose.

54. From creation to termination of the Stewart Trust, the trustees have petitioned, filed an action, motion or otherwise sought an order, judgment or ruling by a Connecticut court only with respect to (i) this proceeding; (ii) the probate proceeding relating to the Will of Elvira R. Evens, deceased, and (iii) the proceeding to settle the Final Account of the Trustee upon termination of the Stewart Trust.

55. From creation to termination of the Stewart Trust, the trustees have answered or otherwise responded only to motions, petitions, or actions brought before a Connecticut court with respect to (i) this proceeding; (ii) the probate proceeding relating to the Will of Elvira R. Evens, deceased, in the probate court for the district of New Canaan, Connecticut; and (iii) in the proceeding to settle the Final Account of the Trustee upon termination of the Stewart Trust.

Payment of Taxes

56. On or before December 15, 1994, the Stewart Trust made a timely filing of a 1993 Connecticut Fiduciary Income Return (Form CT-1041). With the return, the Stewart Trust paid Defendant $70.00 in income taxes, plus interest thereon of $7.00.

57. For the 1993 taxable year, the Stewart Trust properly did not pay income tax to any State other than the State of Connecticut.

58. No court other than the Connecticut probate court has exercised jurisdiction over the Stewart Trust either in an administrative or judicial process.

WORCESTER TRUST

Plaintiff

59. Plaintiff, The Chase Manhatten Bank, as successor to Central Hanover Bank and Trust Company, has served as Trustee of the Worcester Trust since its creation. John G. Jackson served as Trustee from his appointment at creation of the Worcester Trust until April 27, 1959. No other person or entity has served as trustee.

60. Plaintiff, The Chase Manhattan Bank, is a banking corporation incorporated under the laws of the State of New York. The appointment of its predecessor, Central Hanover Bank and Trust Company, was approved by the probate court for the district of New Canaan, Connecticut on February 1, 1938 pursuant to the Connecticut General Statutes.

61. John G. Jackson was not a resident or domiciliary of the State of Connecticut at any time that he acted as Trustee of the Worcester Trust. His appointment as Trustee was approved by the probate court for the district of New Canaan, Connecticut on February 1, 1938 pursuant to the Connecticut General Statutes.

The Trust Instrument and Beneficiaries

62. The Worcester Trust is a testamentary trust established under the Will of James N. Worcester, who died on January 10, 1936. The Will of James N. Worcester was probated in the Probate Court of the District of New Canaan, Connecticut. James N. Worcester died a resident and domiciliary of the State of Connecticut.

63. Under Article FIFTH of his Will, the testator James N. Worcester left his residuary estate in trust for

the benefit of his widow, Gertrude F. Worcester, until her death or remarriage. Gertrude F. Worcester died a resident and domiciliary of the State of Connecticut in 1983.

64. After the death of the testator's widow, Gertrude F. Worcester, in 1983, Article FIFTH of the Will directed that the Worcester Trust be continued to pay all income to his only child, Dr. James N. Worcester, Jr., for life.

65. The Worcester Trust will terminate upon the death of Dr. James N. Worcester, Jr., at which time the trust assets will be distributed as Dr. James N. Worcester, Jr., may appoint by a general testamentary power of appointment, or, in default of such an appointment, to Dr. James N. Worcester, Jr.'s then living issue, *per stirpes.* The class of remaindermen who will take in the event that Dr. James N. Worcester, Jr. does not exercise his general testamentary power of appointment currently includes his four living children, namely (a) Terry Lynn Crowley, (b) Steven J. Worcester, (c) Peter C. Worcester, and (d) Leigh W. Carpenter, and his three living grandchildren by his deceased son, James W. Worcester, namely (i) Sheri Leigh Costelli, (ii) Michael Costelli, and (iii) Lindsay Worcester.

66. Dr. James N. Worcester currently is a resident and domiciliary, and at all times relevant to this proceeding has been a resident and domiciliary, of the State of Connecticut. One of his four living children, namely Terry Lynn Crowley, is a resident and domiciliary of the State of Connecticut.

Trust Administration

67. The corpus of the Worcester Trust consisted solely of cash and securities during its 1993 taxable year. Certain securities that were held by the Worcester Trust in 1993 are listed in Exhibit D attached hereto. The cash

and securities were held in an account at The Chase Manhattan Bank.

68. The Worcester Trust previously owned real property situated in East Hunting Ridge Road, Stamford, Connecticut. That interest was held from creation of the trust until it was sold on May 25, 1939.

69. The Worcester Trust previously held a $20,000 note secured by a mortgage on the real property situated in East Hunting Ridge Road, Stamford, Connecticut, that was payable as follows: $5,000 due on December 1, 1939, $1,000 due on December 1, 1940, $1,000 due on December 1, 1940 and $13,000 due on June 1, 1942.

70. The Worcester Trust held shares and a proprietary lease for a cooperative apartment situated in Yonkers, New York from June 2, 1952 until it was sold on October 15, 1973. The Worcester Trust subsequently held shares and a proprietary lease for a cooperative apartment situated in Putnam Hill Apartments, Greenwich, Connecticut from October 1, 1973 until it was sold on April 30, 1980.

71. At no time during 1993 did the Worcester Trust earn any income that was derived from or connected with the ownership or disposition of any interest in real or tangible personal property, whether in Connecticut or elsewhere, or from a business, trade, profession or occupation carried on by the trust, whether in Connecticut or elsewhere.

72. Periodic accountings have been filed on behalf of the Worcester Trust in the probate court for the District of New Canaan, Connecticut for the following periods:

Feb. 1, 1937	-	May 1, 1938
May 1, 1938	-	May 1, 1939
May 1, 1939	-	May 1, 1940
May 1, 1940	-	May 1, 1941

May 1, 1941	-	May 1, 1942
May 1, 1942	-	May 1, 1943
May 1, 1943	-	May 1, 1944
May 1, 1944	-	May 1, 1945
May 1, 1945	-	May 1, 1946
May 1, 1946	-	May 1, 1947
May 1, 1947	-	May 1, 1948
May 1, 1948	-	May 1, 1949
May 1, 1949	-	May 1, 1950
May 1, 1950	-	May 1, 1951
May 1, 1951	-	May 1, 1952
May 1, 1952	-	May 1, 1953
May 1, 1953	-	May 1, 1954
May 1, 1954	-	May 1, 1955
May 1, 1955	-	May 1, 1956
May 1, 1956	-	May 1, 1957
May 1, 1957	-	May 1, 1958
May 1, 1958	-	May 1, 1959
May 1, 1959	-	May 1, 1960
May 1, 1960	-	May 1, 1961
May 1, 1961	-	May 1, 1962
May 1, 1962	-	May 1, 1963
May 1, 1963	-	May 1, 1964
May 1, 1964	-	May 1, 1965
May 1, 1965	-	May 1, 1966
May 1, 1966	-	May 1, 1967
May 1, 1967	-	May 1, 1968
May 1, 1968	-	May 1, 1969
May 1, 1969	-	May 1, 1971
May 1, 1971	-	May 1, 1974
May 1, 1974	-	May 1, 1977
May 1, 1977	-	June 20, 1980
June 20, 1980	-	May 1, 1983
May 1, 1983	-	May 1, 1986
May 1, 1986	-	May 1, 1989

May 1, 1989	-	May 1, 1992
May 1, 1992	-	May 1, 1995

All such periodic accountings (with the exception of the latest, where approval of the accounting is pending) were approved by the probate court for the district of New Canaan, Connecticut.

73. Since creation of the Worcester Trust, the trustees have held or participated in meetings in Connecticut regarding the Worcester Trust in connection with this proceeding and for no other purpose. Such meetings were attended by officers of the corporate trustee and by attorneys for the trustees only. Additionally, agents of the trustee were present in Connecticut from time to time from 1973 until 1980 for the purpose of inspecting the trust's interest in the cooperative apartment situated in Putnam Hill Apartments, Greenwich, Connecticut.

74. Since creation of the Worcester Trust, the trustees have only appeared, represented and/or participated in the proceedings before a Connecticut court on behalf of the Worcester Trust in connection with (i) this proceeding; (ii) proceedings related to the Will of James W. Worcester, deceased, in the probate court for the district of New Canaan, Connecticut, and (iii) periodic accounting proceedings in the probate court for the district of New Canaan, Connecticut (see Paragraph 72 above), and for no other purpose.

75. Since creation of the Worcester Trust, the trustees have petitioned, filed an action, motion or otherwise sought an order, judgment or ruling by a Connecticut court only with respect to (i) this proceeding; (ii) the probate proceeding relating to the Will of James W. Worcester, deceased, in the probate court for the district of New Canaan, Connecticut; and (iii) the periodic accounting proceedings (see Paragraph 72 above).

76. Since creation of the Worcester Trust, the trustees have answered or otherwise responded only to motions, petitions or actions brought before a Connecticut court with respect to (i) this proceeding; (ii) the probate proceeding relating to the Will of James W. Worcester, deceased, in the probate court for the district of New Canaan, Connecticut; and (iii) in the periodic accounting proceedings (see Paragraph 72 above).

77. For the 1993 taxable year, the Worcester Trust properly did not pay income tax to any State other than the State of Connecticut.

78. No court other than the Connecticut probate court has exercised jurisdiction over the Worcester Trust either in an administrative or judicial process.

ADOLFSSON TRUST

Plaintiff

79. Plaintiff, The Chase Manhattan Bank, as successor to Manufacturers Hanover Trust Company, as served as Trustee of the Adolfsson Trust since its creation. No other person or entity has served as trustee.

80. Plaintiff, The Chase Manhattan Bank, is a banking corporation incorporated under the laws of the State of New York. The appointment of its predecessor, Manufacturers Hanover Trust Company, as Trustee of the Adolfsson Trust was not approved, and did not require approval, by a Connecticut probate court.

The Trust Instrument and Beneficiaries

81. The Adolfsson Trust is an *inter vivos* trust established under an irrevocable Trust Agreement dated March 16, 1955 (the "Trust Agreement") by the late Charles Anderson Dana, who was a resident and domiciliary of the State of Connecticut at the time that he ex-

ecuted it. Charles Anderson Dana died a resident and domiciliary of the State of Connecticut on November 25, 1979. His Will was probated in the probate court for the District of Norwalk, Connecticut.

82. Under Article FIRST of the Trust Agreement, the Trustee is directed to distribute all income to beneficiary Sandra Leigh Dana (subsequently and until recently known as Sandra Adolfsson, but currently known as Sandra O'Donnell) in quarterly installments from the time that she attained the age of twenty-eight (28) years until the trust terminates. Ms. Adolfsson was born on July 4, 1954 and is currently forty-two (42) years of age.

83. The Adolfsson Trust will terminate upon the earlier to occur of (i) Ms. Adolfsson's attainment of the age of forty-eight (48) years or (ii) her death, at which time the trust residue will be distributed to her outright if she is then living, or, if not, to such of her descendants as she may appoint by Will, or, in default of such an appointment, to her then living descendants, *per stirpes*. The class of remaindermen that will take in the contingency that Ms. Adolfsson does not survive to age forty-eight (48) years and does not exercise her testamentary power of appointment currently consists of her two children, James O'Donnell and Andrew O'Donnell.

84. Ms. Adolfsson is, and has been at all times relevant to this action, a resident and domiciliary of the State of Connecticut. Her two children reside with her, and, accordingly, are residents and domiciliaries of the State of Connecticut.

Trust Administration

85. The corpus of the Adolfsson Trust consisted solely of cash and securities during its 1993 taxable year. Certain securities that were held by the Adolfsson Trust in

1993 are listed in Exhibit E attached hereto. The cash and securities were held in an account at The Chase Manhattan Bank.

86. The Adolfsson Trust made a $25,000 loan agreement with the Ms. Adolfsson on September 24, 1981, which loan agreement was distributed out to her upon her 28th birthday on July 4, 1982, as part of the one-third share of principal due her as beneficiary on that date.

87. At no time during 1993 did the Adolfsson Trust earn any income that was derived or connected with the ownership or disposition of any interest in real or tangible personal property, whether in Connecticut or elsewhere, or from a business, trade, profession or occupation carried on by the trust, whether in Connecticut or elsewhere.

88. Since creation of the Adolfsson Trust, the trustees have held or participated in meetings in Connecticut regarding the Adolfsson Trust in connection with this proceeding and for no other purpose. Such meetings were attended by officers of the corporate trustee and by attorneys for the trustee only.

89. Since creation of the Adolfsson Trust, the trustees have only appeared, represented and/or participated in proceedings before a Connecticut court regarding the Adolfsson Trust in connection with this proceeding and for no other purpose.

CHEMICAL BANK

90. In 1993, Chemical Bank acted as trustee of all five plaintiffs. Subsequently, in 1996, Chemical Bank merged with The Chase Manhattan Bank, leaving Chemical Bank as the surviving corporation. Chemical Bank changed its name on July 13 of that year to The Chase Manhattan Bank.

91. In 1993, Chemical Bank had not applied for a certificate of authority from the Connecticut Secretary of the State under the provisions of Connecticut statutory law, including the Stock Corporation Act, to transact business in the State of Connecticut.

92. In 1993, Chemical Bank, in its capacity as a commercial bank, made no tax returns, filings or other submissions to the Connecticut Department of Revenue Services related to its carrying on or doing business in Connecticut, and paid no taxes to the Connecticut Department of Revenue Services in that capacity.

Dated: June 17, 1997

Respectfully submitted,

DEFENDANT

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-and-

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EXHIBIT A

CERTAIN SECURITIES HELD BY PARRY TRUST IN 1993

THE TAXABLE BOND FUND OF CHEMICAL BANK

THE BALANCED FUND OF CHEMICAL BANK

GREEN MOUNTAIN URANIUM CORP.

EXHIBIT B

CERTAIN SECURITIES HELD BY DALLETT TRUST IN 1993

THE CORE EQUITY FUND OF CHEMICAL BANK

THE INTERMEDIATE TERM TAX-EXEMPT BOND FUND OF CHEMICAL BANK

EXHIBIT C

CERTAIN SECURITIES HELD BY STEWART TRUST IN 1993

BELLSOUTH CORP.

JOHNSON & JOHNSON

MOBIL CORPORATION

PROCTER & GAMBLE CO.

UNITED STATES TREASURY NOTES

EXHIBIT D

CERTAIN SECURITIES HELD BY WORCHESTER TRUST IN 1993

THE BALANCED FUND OF CHEMICAL BANK
AIRTOUCH COMMUNICATIONS

THE TAX-EXEMPT BOND FUND OF CHEMICAL BANK

THE INTERNATIONAL EQUITY FUND OF CHEMICAL BANK

OGDEN CORP.

PACIFIC TELESIS GROUP

SOUTHERN NEW ENGLAND TELECOMMUNICATIONS CORP.

EXHIBIT E

CERTAIN SECURITIES HELD BY ADOLFSSON TRUST IN 1993

PROVIDENT INSTITUTIONAL NY MUNI FUND

THE TAX-EXEMPT BOND FUND OF CHEMICAL BANK

DANA CORP.

DISNEY (WALT) CO.

EXXON CORP.

HONEYWELL INC.

MINNESOTA MINING & MANUFACTURING CO.

THE SMALLER COMPANIES EQUITY FUND OF CHEMICAL BANK

THE INTERNATIONAL EQUITY FUND OF CHEMICAL BANK

APPENDIX C

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN, AT HARTFORD

CV 960560970

Chase Manhattan Bank, Trustee et al.[1] v. Gene Gavin, Commissioner of Revenue Services

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MEMORANDUM OF DECISION

This case presents a number of challenges to the constitutionality of the State of Connecticut's income tax as to five specific trusts. The plaintiffs are the trustees[2] of the five separate trusts which in 1993, paid Connecticut income tax as "resident" trusts pursuant to General Statutes 12-701(a)(4). Plaintiffs filed timely requests for refunds. These requests were denied by the defendant Commissioner of Revenue Services (Commissioner). Plaintiffs are aggrieved by such decision and this appeal is authorized under 12-730.[3] For the reasons set forth below, the court finds the issues in favor of the defendant.

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[1] On April 22, 1997, the court (Maloney, J.) granted permission to substitute The Chase Manhattan Bank for the original trustee Chemical Bank. Chemical Bank's name was changed because of a merger with The Chase Manhattan Bank.

[2] The trustees sue as representatives of the trusts. General Statutes 52-106.

[3] In appeals pursuant to General Statutes 12-730 the trial court is not limited to the procedure and standard of review under the Uniform Administrative Procedures Act (UAPA), 4-166 et seq. General Statutes 4-186(a). The process involves a de novo review by the trial court hearing evidence and exercising its equitable authority. Section 12-730. See Gallacher v. Commissioner of Revenue Services, 221 Conn. 166, 176, 602 A.2d 996 (1992).

The parties have stipulated to the facts and submitted uncontroverted affidavits in support of their cross motions for summary judgment.

The trusts present somewhat different factual scenarios but all of the plaintiffs rely on the same fundamental claims. The plaintiffs assert that the trusts, trustees, assets and beneficiaries have such limited contact with Connecticut that requiring the trusts to pay the Connecticut income tax denies them due process of law.[4] Plaintiffs also assert a commerce clause claim under art. I., 8, cl. 3, of the United States Constitution. The commerce clause claim asserts that the Connecticut income tax on "resident trusts" seriously, unreasonably and unduly burdens interstate commerce.

In order to determine the constitutionality of Connecticut's taxing the income of the "resident trusts" the facts must be reviewed as to each trust.

Parry Trust

This testamentary trust was established in Connecticut by the will of Sidney L. Parry, upon his death in 1968.

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[4] The plaintiffs claim due process of law violations under both the fourteenth amendment to the United States Constitution and article first, 8 of the Connecticut Constitution. The plaintiffs in a footnote assert that the due process analysis under the federal constitution applies to the state due process analysis. "Although we often look to United States Supreme Court precedent when construing related provisions in our state constitution we may determine that 'the protections afforded to the citizens of the state by our constitution go beyond those provided by the federal constitution as that document has been interpreted by the United States Supreme Court.' "(Internal quotation marks omitted.) State v. Linares, 232 Conn. 345, 379, 655 A.2d 737 (1995). Because the plaintiffs did not present a separate analysis for the state constitutional claim, the court will not review the plaintiffs' due process claim under the state constitution. State v. Kiser, 43 Conn. App. 339, 354, 683 A.2d 1021 (1996).

Mr. Parry at the time of his death was a resident and domiciliary of Connecticut. The widow of Mr. Parry would take a share of the trust as life tenant, upon her death her daughter will become the life beneficiary and her grandchildren the remaindermen. (Stipulation of Facts, pp. 6-9.)

A predecessor of The Chase Manhattan Bank and two individuals were appointed trustees of the trust. None of the beneficiaries of the trust is or has been since its inception a resident or domiciliary of Connecticut.

None of the trust assets is located in Connecticut, nor has any been since 1980. Also since at least 1980, no aspect of the trust administration was located in Connecticut. No income of the trust was in any way connected with or derived from sources within Connecticut in 1993. For the 1993 tax year, the Parry trust did not pay income tax to any state other than Connecticut.

Mr. Parry's will was probated in the Probate Court for the District of Westport in 1968. The will excused the trustees from rendering periodic accounts, and none has been filed by the trustees. (Stip. 14, 15; also see General Statutes 45a-177.) The trustees must file a final accounting with the Probate Court, as a final accounting cannot be waived under Connecticut law. General Statutes 45a-175 (Capuano/Parry Affidavit).

The Parry Trust has the least contact with Connecticut of any of the five plaintiff trusts. The Connecticut connections consist of the domicile and residence of the settlor; the probating of his will in the Connecticut Probate Court; jurisdiction of the Probate Court over accounts of trustees as fiduciaries pursuant to General Statutes 45a-175 and the requirement for a final accounting by the trustees pursuant to General Statutes 45a-175 and 45a-177.

Dallett Trust

The Dallett Trust is a testamentary trust established under the will of John Dallett, who was a resident and domiciliary of Connecticut at the time of his death in 1975. The will was probated in the Probate Court for the District of Westport.

The will placed a portion of the estate in a trust which paid its income to Mr. Dallett's son for his life. Upon the death of the son the income would go to the grandchildren until the youngest reaches the age of twenty-three. The only grandchild is currently over the age of twenty-three.

Similar to the Parry Trust, no assets or income of the Dallett trust are connected to Connecticut, the trustees and beneficiaries are not residents or domicilaries of Connecticut, and no aspect of the trust administration was located in Connecticut. The Dallett trust did not pay income tax to any state other than Connecticut in 1993.

The Dallett trustees have filed six periodic accountings with the Probate Court. Thus, the jurisdiction of the Probate Court has in fact been continuous.

The Stewart Trust

This is a testamentary trust established under the will of Elvira R. Evens who died in 1974 a resident and domiciliary of Connecticut. Her will was probate in the Probate Court for the District of New Canaan.

The will established a trust to pay income to her daughter, Grace Evens Stewart, for life. In 1995 the daughter died and the trust assets were distributed to the grandchildren who had been named remaindermen. Grace Evens Stewart was a resident and domiciliary of Connecticut. One of the two remaindermen was a Connecticut resident.

As is the case with all the testamentary trusts, the trustees were not Connecticut residents or domiciliaries, no assets were located in Connecticut, no income was derived from sources in Connecticut, no trust administration occurred in Connecticut, and in 1993, no income taxes were paid to any state other than Connecticut.

The will exempted the trustees from filing periodic accounts and none were filed. However, a final accounting was filed in 1995 as required by 45a-175, 45a-177 and 45a-179. The Probate Court reviewed the final accounting and issued its allowance of the final account on January 3, 1996.

Worcester Trust

This is the fourth of the testamentary trusts. It was created under the will of James N. Worcester, who died in 1936, a Connecticut resident domiciliary. The will was probated in the Probate Court for the District of New Canaan. The residuary estate was left in this trust which paid the income to the widow until her death in 1983. Subsequently, the income was paid to her only son a resident and domicilary of Connecticut. Upon his death the trust will terminate at which time the trust assets will be distributed as the son may appoint or, in default of such appointment, to the son's living issue. Only one of the son's living children is a Connecticut resident and domiciliary.

The trustee is not a Connecticut resident or domiciliary. None of the trust assets or income are connected to Connecticut though from October 1, 1973, to April 30, 1980, the trust held shares and a proprietary lease for a cooperative apartment in Greenwich, Connecticut. The trust is administered in New York. As with the other testamentary trusts, the Worcester trust did not pay income tax to any state other than Connecticut in 1993.

The trustees have filed 40 interim accounts which have been reviewed and approved by the Probate Court.

Adolfsson Trust

This is an inter vivos trust established in 1995 by Charles Anderson Dana, a Connecticut resident and domiciliary who died in 1979.

The trust provides that its income will be paid to his daughter once she attains the age of twenty-eight until her death or her attainment of the age of forty-eight. The daughter presently is forty-two years of age and has children. The beneficiary and contingent beneficiaries are Connecticut residents.

The trustee is not a Connecticut resident or domiciliary. The trust assets and income are not located in or connected to Connecticut. The trust is administered in New York.

All of these trusts share certain characteristics. All were created in Connecticut by Connecticut residents. All of the trusts have been probated in Connecticut. All of the trusts are subject to final accounting requirements of Connecticut law. None of the trusts has Connecticut trustees, trust administration, trust assets in Connecticut or trust income connected with or derived from sources in Connecticut.

The Parry Trust has no additional contacts with Connecticut.

The Dallett Trust has the additional contacts of interim periodic accounts which were reviewed and allowed by Probate Court.

The Stewart Trust has the additional contacts of beneficiaries being residents of Connecticut.

The Worcester Trust has additional contacts because both beneficiaries are present in Connecticut and the periodic accounts have been filed.

The Adolfsson Trust is the only inter vivos trust. The trust settlor and beneficiary were Connecticut residents.

Connecticut's income tax imposes a tax upon the undistributed income and realized gains of "resident" trusts. A "resident" trust is any testamentary trust created by a decedent who was domiciled in Connecticut at the time of death and any inter vivos trust created by a settlor who was domiciled in Connecticut at the time the trust was funded and became irrevocable. General Statutes 12-701 (a)(4).[5] The plaintiff trusts were all "resident" trusts for the purposes of 12-701(a)(4).

This case raises issues of first impression in this jurisdiction; though the court is informed by decisions on point in other jurisdictions. See District of Columbia v. Chase Manhattan Bank, 689 A.2d 539 (D.C. App. 1997); Pennoyer v. Taxation Division Director, 5 N.J. Tax 386 (N.J. Tax Court 1983); Taylor v. State Tax Commission, 85 A.D.2d 821, 445 N.Y.S.2d 648 (3d Dept. 1981); First National Bank of Boston v. Harvey, 111 Vt. 281, 16

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[5] General Statutes 12-701(a) provides in pertinent part: "(4) 'Resident trust or estate' means (A) the estate of a decedent who at the time of his death was a resident of this state . . . (D) a trust, or a portion of a trust, consisting of the property of (i) a person who was a resident of this state at the time the property was transferred to the trust if the trust was then irrevocable, (ii) a person who, if the trust was revocable at the time the property was transferred to the trust, and has not subsequently become irrevocable, was a resident of this state at the time the property was transferred to the trust or (ii) a person who, if the trust was revocable when the property was transferred to the trust but the trust has subsequently become irrevocable, was a resident of this state at the time the trust became irrevocable . . ."

A.2d 184 (Vt. 1940); Bayfield County v. Fisher, 162 Wis. 466, 156 N.W. 463, 464 (Wis. 1916); and City of Augusta v. Kimball, 91 Me. 605, 40 A. 666 (Me. 1898); for cases involving taxing testamentary trusts. See, concerning taxation of inter vivos trusts, Blue v. Michigan Dept. of Treasury, 185 Mich. App. 406, 462 N.W.2d 762 (Mich. App. 1990); Potter v. Taxation Division Director, 5 N.J. Tax 399 (N.J. Tax Court 1983); Mercantile-Safe Deposit & Trust Co. v. Murphy, 19 A.D.2d 765, 242 N.Y.S.2d 26 (3d Dept. 1963), aff'd, 15 N.Y.2d 579, 255 N.Y.S.2d 96, 203 N.E.2d 490 (1964); McCulloch v. Franchise Tax Board, 61 Cal. 2d 186, 390 P.2d 412, 37 Cal. Rptr. 636 (Cal. 1964).

The leading case on the constitutional limits of a state's ability to tax is Quill Corp. v. North Dakota, 504 U.S. 298, 326, 119 L. Ed. 2d 91, 112 S. Ct. 1904 (1992). Quill involved the imposition of the North Dakota use tax on an out-of-state mail-order house with no outlets or sales representatives in North Dakota. The tax required the mail-order company to collect and pay a use tax on goods purchased by consumers for use in North Dakota.

The constitutional challenges to the tax, as in this case, were under the due process and commerce clauses of the federal constitution. The due process nexus requirement concentrates on fundamental fairness, i.e., "whether an individual's connections with a state are substantial enough to legitimate the state's exercise of power over him." Id., 312. "In contrast, the Commerce Clause and its nexus requirement are informed . . . by structural concerns about the effects of state regulation on the national economy." Id. Thus, "the Due Process Clause and the Commerce Clause are analytically distinct." Id. 305.

Due Process

The court first turns to the plaintiffs' due process challenge to the income tax on testamentary trusts in Connecticut.

The Plaintiffs' due process claim is in essence a challenge to the fairness of Connecticut taxing the trust income in view of the limited connection with the trusts. In regard to the testamentary trusts; the trustees, trust assets, beneficiaries and trust administration are all located outside of Connecticut. The Connecticut connections are the creation of the trust in Connecticut and the Probate Court supervision of the trusts.

In Quill, the Supreme Court conducted its due process analysis recognizing that:

> Our due process jurisprudence has evolved substantially in the twenty-five years since Bellas Hess [v. Dept. of Revenue of Ill., 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967)], particularly in the area of judicial jurisdiction. Building on the seminal case of International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945), we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Id., 316, ((quoting Milliken v. Meyer, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)). In that spirit, we have abandoned more formalistic tests that focused on a defendant's "presence" within a state in favor of a more flexible inquiry into whether a defendant's contacts with the forum make it reasonable, in the context of our federal system of government, to require it to defend the suit in

> that state. In Shaffer v. Heitner, 433 U.S. 186, 212, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), the court extended the flexible approach that International Shoe had prescribed for purposes of in personam jurisdiction to in rem jurisdiction, concluding that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.

(Internal quotation marks omitted.) Quill Corp. v. North Dakota, supra, 504 U.S. 307.

The court proceeded to conclude and hold:

> Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a state for the imposition of a duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.
>
> In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the state . . . the Due Process Clause does not bar enforcement of that state's use tax against Quill.

Quill v. North Dakota, supra, 504 U.S. 308-09.

Following the analysis of Quill, the District of Columbia Court of Appeals rejected a due process clause challenge to an income tax on a testamentary trust under facts which are very close to those involving the four testamentary trusts in the present case. District of Columbia v. Chase Manhattan Bank, supra, 689 A.2d 539. District of Columbia held taxable the undistributed income of a testamentary trust created by the will of a Dis-

trict resident even though the trustee, trust assets, trust administration and beneficiaries of the trust at issue were located outside the District during the pertinent tax years. The trust had been created by the will of a District of Columbia resident. The trustees filed annual accountings and litigation of claims by individuals seeking beneficiary status was prosecuted in the District of Columbia courts.

The District of Columbia court noted Quill's abandonment of formalistic tests focusing on the taxpayer's presence within a state "for a more flexible inquiry into sufficient contacts with the forum making it reasonable for the state's exercise of jurisdiction." District of Columbia v. Chase Manhattan Bank, supra, 689 A.2d 542.

The court in District of Columbia found that:

> A testamentary trust of a District resident, which has been probated in the courts of the District of Columbia, has a relationship to the District distinct from the relationship, if any, between the District and the trustee or trust assets.

689 A.2d at 544.

This finding is supported by George T. Bogert's treatise Trusts 177, at 686:

> If a court of the domiciliary state has already assumed jurisdiction, the courts of another state with jurisdiction based upon the situs of the property or upon the trustee's domicile generally will decline to entertain a proceeding relating to the construction, validity or administration of the trust.

Also see Restatement (Second) of Conflicts of Laws 267 cmt. d. (1971).

In reaching this conclusion, the court noted that Quill equates the state's power to tax with its power to exercise

jurisdiction, and concluded that the District's ties to the trust itself justify both the District's continuing jurisdiction over the trust and the District's taxation of the entire net income of the trust (irrespective in both instances of the location of the trustee, trust assets, or trust beneficiaries).

The court in District of Columbia analogied the "resident" trust to a domestic corporation. "A testamentary trust, like a corporation, is a creature of the laws of the state where it is created and owes its very existence to those laws." 689 A.2d at 544. The consequence of such connection for corporations is the taxing authority of its state of origin. "[A corporation] must dwell in the place of its creation, and cannot migrate to another sovereignty. The fact that its property and business were entirely in another state did not make it any less subject to taxation in the state of its domicile. Cream of Wheat Co. v. Grand Forks County, North Dakota, 253 U.S. 325, 328, 64 L. Ed. 931, 40 S. Ct. 558 . . . [(1920)]." District of Columbia v. Chase Manhattan Bank, supra, 689 A.2d 545. Also, see Commercial Credit Consumer Services, Inc. v. Norberg, 518 A.2d 1336, 1337-38 (R.I. 1986).

A further analogy was drawn to the power of a state to tax the entire income of a resident, regardless of its source. "Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence and the attendant rights to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. New York ex rel. Cohn v. Graves, 300 U.S. 308, 313, 81 L. Ed. 666, 57 S. Ct. 466 . . . (1937)." (Internal quotation marks omitted.) District of Columbia v. Chase Manhattan Bank, supra, 689 A.2d 542. Also, see Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 132 L. Ed. 2d 400, 115 S. Ct. 2214 (1995).

Plaintiffs criticize the analysis in the District of Columbia decision. Plaintiffs analogize the testamentary trusts to relationships at law rather than to legal entities. Legal relationships such as marriage do not give the state which created the relationship continuing jurisdiction in the absence of residency of at least one of the parties. See General Statutes 46b-44 and Homer H. Clark, Jr. The Law of Domestic Relations in the United States, 13.2 (2d ed. 1987).

Trusts, unlike other legal relationships, have been recognized as a separate entity for tax purposes. Anderson v. Wilson, 289 U.S. 20, 27, 77 L. Ed. 1004, 53 S. Ct. 417 (1933). "It may well be that sound fiscal policy would be promoted by a tax upon trust intangibles levied only by the state that is the seat of a testamentary trust." Greenough v. Tax Assessors of Newport, 331 U.S. 486, 490, 67 S. Ct. 1400, 91 L. Ed. 1621 (1947). This is essentially the policy adopted in the District of Columbia decision, regarding the tax on the income of a testamentary trust. It is also critical in analyzing these trusts to consider the clear legislative determination that "resident trusts" are entities for income tax purposes. General Statutes 12-700, et seq. Trusts often do dictate legal relationships, but, certainly in the tax field, trust constitute legal entities.

Plaintiffs also criticize what they describe as a "faulty syllogism" in District of Columbia: if the D.C. courts have judicial jurisdiction over a testamentary trust, then the District should also have taxing jurisdiction over the trust. Plaintiffs correctly point out that due process still requires that for taxing jurisdiction the question is whether "the state has given anything for which it can ask return." Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444, 85 L. Ed 267, 61 S. Ct 246 (1940) The Quill

decision in fact concluded: "In this case there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the state." Quill Corp. v. North Dakota, supra, 504 U.S. 308.

In the context of this case, the trusts must have received something from Connecticut for which the state can ask return. This is the crux of the due process analysis.

Connecticut through its laws allows the creation of testamentary trusts. Plaintiffs attribute the domicile of the settlor to more historical interest or happenstance. Unquestionably, as to testamentary trusts, there is neither a common law nor constitutional right to direct the distribution of property after death.

> Rights of succession to the property of the deceased . . . are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit or even abolish the power of testamentary disposition of property within its jurisdiction.

Irving Trust Co. v. Day, 314 U.S. 556, 562, 86 L. Ed. 452, 62 S. Ct. 398 (1942).

> Since the right to transmit or receive property upon the death of the owner is not an inherent right but a privilege granted by the state, it is obvious that that privilege may be abridged or coupled with conditions at the will of the state.

Blodgett v. Bridgeport City Trust Co., 115 Conn. 127, 142, 161 A. 83 (1932); see General Statutes 45a-250,

In creating these testamentary trusts, the settlors exercised and took advantage of a right or a privilege granted by Connecticut law. It is fair to say that the trusts owe their existence to Connecticut law. Like the individual domiciliary or Connecticut corporation, the resident trust may invoke the protection of Connecticut law and thus be responsible to share the costs of government.

The probating of the trusts in Connecticut is also a substantial contact. Once again Connecticut law is relied upon for review, approval and protection of the trusts.

The "continuing jurisdiction" of the probate courts varied as to each trust, but in all events the trusts were protected by the requirement for a final accounting, statutory standards for trustees, and the availability of a forum in which to litigate issues relating to the trust. See District of Columbia v. Chase Manhattan Bank, supra, 689 A.2d 545.

Plaintiffs challenge the extent of Connecticut's jurisdiction when the beneficiaries are non-residents. In this case the trustee of all five trusts is subject to Connecticut jurisdiction as was specifically determined in Thomason v. Chemical Bank, 234 Conn. 281, 661 A.2d 595 (1995). The absence of beneficiaries [6] as residents or persons with

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[6] Connecticut recognizes that beneficiaries in that they are represented by the trustees, may not be necessary parties to litigation relating to the trust. Palmer v. Hartford National Park Trust Co., 160 Conn. 415, 425, 279 A.2d 726 (1971). Also, see General Statutes 52-106 which provides: "An executor, administrator or trustee of an express trust may sue or be sued without joining the persons represented by him and beneficially interested in the action.'' In this case none of the beneficiaries are parties.

The trustees' duties to beneficiaries are noted in Gimbel v. Bernard T. & Alva B. Gimbel Foundation, Inc., 166 Conn. 21, 34, 347 A.2d 81 (1974); and Connor v. Hart, 157 Conn. 265, 277, 253 A.2d 9 (1968).

sufficient contact with Connecticut to satisfy due process limitations (see Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)) is cited by plaintiffs as an impediment to Probate Court jurisdiction. "Connecticut Probate Courts are empowered specifically to determine upon the allowance of the interim and final accounts of trustees, the rights of the fiduciaries and the parties interested in the trusts. General Statutes 45a-175, 45a-176 and 45a-177. The Connecticut Supreme Court in commenting on the powers of the probate court noted: "The court also had the jurisdiction and the power to determine incidental questions so far as necessary to enable it to reach a correct conclusion in the administration of the estate." Brownell v. Union New Haven Trust Co., 143 Conn, 662, 665, 124 A.2d 901 (1956).

In that the trustee is amendable to service in Connecticut and the situs of the trust is in Connecticut, Connecticut law and courts provide an effective forum for the protection of the trust. Connecticut law has also recognized the appropriateness of its jurisdiction regarding "resident trusts." Morgan Guaranty Trust Co. v. Huntington, 149 Conn. 331, 348, 179 A.2d 604 (1967). "Since these assets have become a part of the testator's residuary trust, and the will indicates no intention that this trust or any of its subdivisions should be administered under the law of any other jurisdiction, the usual rule applies, and the trust should be administered according to the law of the testator's domicil at the time of his death, that is, Connecticut." [7] Id., 348.

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[7] The domicile of Chase Manhattan a trust of each of these trusts is New York Like Connecticut, New York bases its tax treatment of testamentary trusts on the domicile of the testator. N.Y. Tax Law 605(b) (3) B.

The domicile of the testator trust settlor, the jurisdiction of the Probate Courts and the trust entity theory are sufficient connections to withstand a due process challenge to the imposition of the tax on the trust income.

Commerce Clause

The plaintiffs next claim that the tax on trust income unduly burdens interstate commerce in trust administration in violation of the commerce clause of the United States Constitution.

In Quill the Supreme Court reiterated the test on this issue: "we will sustain a tax against a commerce clause challenge so long as the tax (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state." 504 U.S. at 311, 112 S. Ct. 1904, 119 L. Ed. 2d 91, citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977).

The law has moved away from prohibiting direct taxation of interstate commerce to adopting an inquiry into the practical effect of the challenged tax.

The original income tax did not tax resident trusts, with the result that it reached only trusts administered by Connecticut trustees. Connecticut banks fearing the loss of trust business lobbied for the current law which focuses on the domicile of the testator rather than other contacts. Thus, the "resident" trusts will be subject to the income tax wherever they are administered. See 1992 Public Act 92-17, 11.

The history of Connecticut's law illustrates its conformity to the requirement of the second and third part of

the Complete Auto analysis. "The second and third parts of the analysis, which require a fair apportionment and nondiscrimination, prohibit taxes that pass an unfair share of the tax burden on interstate commerce." Quill Corp. v. North Dakota, supra, 504 U.S. 313. What is being taxed is the income of the trust of any trust created by the will of a Connecticut resident. It is not the trustees who are being taxed. Rather, the tax falls equally on the trusts without regard to whether it is intrastate or interstate as to trust administration. It does not discriminate. As to fair apportionment that result seems to follow from the Connecticut statute crediting out of state taxes. General Statutes 12-704.[8]

The remaining elements of the Complete Auto test have been described in Quill Corp. v. North Dakota, supra, 504 U.S. 313: "The first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." Thus, the trusts could have the minimum contacts to meet the due process clause requirements, but lack the substantial nexus with the state required by the commerce clause.

The jurisdiction of Connecticut courts over testamentary trusts created by the wills of its residents is primary jurisdiction. Restatement (Second) of Conflicts of Law 267 (1971). Connecticut authorities describe this as the ordinary rule. See Palmer v. Hartford National Park Trust Co., supra, 160 Conn. 415.

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[8] Plaintiffs raise the spectre of double taxation which can invalidate a tax under a commerce clause challenge. However, there is no evidence of double taxation of these trusts and there is a statutory scheme credting payments to other states. The four testamentary trusts were not taxed by any state other than Connecticut in 1993.

The creation of the trust under Connecticut law, the primary jurisdiction of its courts, the absolute requirement of a final accounting, and the situs of the trust in the state; see George T. Bogert, Trusts 177, supra, at 686; constitute not only sufficient minimal contacts but a substantial nexus to Connecticut.

The income tax is a general revenue tax. The relationship between the tax and state-provided service is of a general nature. Testamentary trusts exist neither as comon law nor constitutional right. Irving Trust Co. v. Day, supra, 314 U.S. 562. They exist only as authorized by state law. The settler having chosen Connecticut law, it is not improper to impose a general obligation tax on the entity which owes its existence to Connecticut law. See Cream of Wheat Co. v. Grand Forks County, supra, 253 U.S. 328 (recognizing the right of a state to tax the income of domestic corporations earning their income in other states). The trust entity domicile in Connecticut may also constitute the basis of a tax on all income. New York ex rel. Cohn v. Graves, 300 U.S. 308, 313, 81 L. Ed. 666, 57 S. Ct. 466 (1937).

The court concludes that the commerce clause does not invalidate Connecticut tax on the testamentary trust income.

Inter Vivos Trust

Connecticut taxes the Adolfsson trust as a "resident inter vivos trust." General Statutes 12-701(a)(4). These types of trusts are taxed only on a pro rata basis dependent upon the ratio of Connecticut resident noncontingent beneficiaries to the total class of noncontingent beneficiaries. All the Adolfsson trust noncontingent beneficiaries are Connecticut residents.

Plaintiffs argue that the Connecticut resident "noncontingent beneficiary" was improperly taxed on all the in-

come of the trust which she received. The trust was taxed on the capital gains earned on the corpus of the trust. The trustee had no power to invade the trust, so the beneficiaries in Connecticut had no rights to the capital gain subject to this tax.

The beneficiaries' residence as the focus of analysis for taxing an inter vivos trust was approved in McCulloch v. Franchise Tax Board, 61 Cal. 2d 186, 390 P.2d 412, 37 Cal. Rptr. 636, appeal dismissed, 379 U.S. 133, 13 L. Ed. 2d 333, 85 S. Ct. 278 (1964):

> We find no reason in constitutional principles or in practical application of such principles why the tax founded upon the residence of the beneficiary should not be sustained.

The McCulloch decision notes the protection provided by state law for the eventual receipt of the trust corpus. Connecticut courts also have jurisdiction to entertain actions by trustees, settlors or beneficiaries of inter vivos trusts to require accounting of actions taken by trustees. General Statutes 45a-175. See United States Trust Co. v. Bohart, 197 Conn. 34, 495 A.2d 1034 (1985). Furthermore, a probate court has the authority, on its own motion or upon the application and complaint of an interested person, to remove a trustee for misconduct or neglect in the exercise of his or her duties. General Statutes 45a-242.

The taxation of the Adolfsson trust is not constitutionally invalid due to the Connecticut residency of the noncontingent beneficiary and the protections afforded by Connecticut law.

The defendant's motion for summary judgment is granted. The plaintiffs' motion for summary judgment is denied. Judgment shall enter for the defendant.

Robert F. McWeeny, J.

APPENDIX D

CONNECTICUT GENERAL STATUTES ANNOTATED
TITLE 12. TAXATION
CHAPTER 229. INCOME TAX

§ 12-701. Definitions

(a) For purposes of this chapter:

(1) "Resident of this state" means any natural person (A) who is domiciled in this state, provided if a person (i) maintains no permanent place of abode in this state, (ii) maintains a permanent place of abode elsewhere and (iii) spends in the aggregate not more than thirty days of the taxable year in this state, such person shall be deemed not a resident or (B) who is not domiciled in this state but maintains a permanent place of abode in this state and is in this state for an aggregate of more than one hundred eighty-three days of the taxable year, unless such person, not being domiciled in this state, is in the armed forces of the United States.

* * * *

(4) "Resident trust or estate" means (A) the estate of a decedent who at the time of his death was a resident of this state, (B) the estate of a person who, at the time of commencement of a case under Title 11 of the United States Code,[1] was a resident of this state, (C) a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at the time of his death was a resident of this state, and (D) a trust, or a portion of a trust, consisting of the property of (i) a person who was a resident of this state at the time the property was transferred to the trust if the trust was then irrevocable, (ii) a person who, if the trust was revocable at the time

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[1] 11 U.S.C.A. § 101 et seq.

the property was transferred to the trust, and has not subsequently become irrevocable, was a resident of this state at the time the property was transferred to the trust or (iii) a person who, if the trust was revocable when the property was transferred to the trust but the trust has subsequently become irrevocable, was a resident of this state at the time the trust became irrevocable. For purposes of this chapter, if any trust or portion of a trust, other than a trust created by the will of a decedent, has both resident and nonresident noncontingent beneficiaries, the Connecticut taxable income of the trust, as defined in subdivision (9) of this subsection, shall be modified as follows: The Connecticut taxable income of the trust shall be the sum of all such income derived from or connected with sources within this state and that portion of such income derived from or connected with all other sources which is derived by applying to all such income derived from or connected with all other sources a fraction the numerator of which is the number of resident noncontingent beneficiaries and the denominator of which is the total number of noncontingent beneficiaries. As used in this subdivision, "noncontingent beneficiary" means a beneficiary whose interest is not subject to a condition precedent.

* * * *

§ 12-704. Credits for income taxes paid to other states

(a) Any resident or part-year resident of this state shall be allowed a credit against the tax otherwise due under this chapter in the amount of any income tax imposed on such resident or part-year resident for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia or any province of Canada on income derived from sources therein and which is also subject to tax under this chapter.

* * * *

APPENDIX E

REGULATIONS OF CONNECTICUT STATE AGENCIES TITLE 12. TAXATION DEPARTMENT OF REVENUE SERVICES INCOME TAX PART IV. RESIDENT AND NONRESIDENT TRUSTS AND ESTATES

Sec. 12-701(a)(9)-1. Connecticut taxable income of a resident trust or estate

* * * *

(b)(1) The Connecticut taxable income of a resident nontestamentary trust with one or more nonresident noncontingent beneficiaries shall be the sum of:

(A) all of the Connecticut taxable income of the trust that is derived from or connected with sources within this state, and

(B) the Connecticut taxable income of the trust that is derived from or connected with all other sources multiplied by a fraction, the numerator of which is the number of resident noncontingent beneficiaries, if any, and the denominator of which is the total number of noncontingent beneficiaries, whether resident or nonresident.

(2) "Derived from or connected with sources within this state" is to be so construed so as to accord with the definition of the term "derived from or connected with sources within this state" set forth in Part II in relation to the adjusted gross income of a nonresident individual.

(3) For purposes of this subsection, "noncontingent beneficiary" means every beneficiary whose interest is not subject to a condition precedent and includes every individual to whom a trustee of a nontestamentary trust during the taxable year (i) is required to distribute cur-

rently income or corpus (or both) or (ii) properly pays or credits income or corpus (or both) or (iii) may, in the trustee's discretion, distribute income or corpus (or both). "Noncontingent beneficiary" includes every beneficiary to whom or to whose estate any of the trust's income for the taxable year is required to be distributed at a specified future date or event and every beneficiary who has the unrestricted lifetime or testamentary power, exercisable currently or at some future specified date or event, to withdraw any of the trust's income for the taxable year or to appoint such income to any person, including the estate of such beneficiary. The provisions of this subsection also apply to a noncontingent beneficiary which is a trust or an estate, and wherever reference is made in this subsection to an individual who is a noncontingent beneficiary, such reference shall be construed to include a trust or estate which is a noncontingent beneficiary, but shall not be construed to include a corporation which is a noncontingent beneficiary.

* * * *

Supreme Court, U.S.
FILED
SEP 27 1999
OFFICE OF THE CLERK

No. 99-366

In The

Supreme Court Of The United States

THE CHASE MANHATTAN BANK, ELIZABETH B. PARRY and HARRISON F. DURAND, as Trustees of a Trust under the Will of Sidney L. Parry, Deceased, for the Benefit of Elizabeth B. Parry et al.;

THE CHASE MANHATTAN BANK and DR. BERNARD L. PACELLA, as Trustees of a Trust under the Will of John Dallett, Deceased, for the Benefit of John Dallett, Jr.;

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under the Will of Elvira R. Evens, Deceased, for the Benefit of Grace Evens Stewart;

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under the Will of James N. Worcester, Deceased, for the Benefit of James N. Worcester, Jr., and

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under Agreement dated March 16, 1955 by Charles Anderson Dana for the Benefit of Sandra Leigh Dana Adolfsson,
Petitioners,

v.

GENE GAVIN, Commissioner of Revenue Services of the State of Connecticut,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of Connecticut correctly rule that, under Supreme Court precedent, the imposition of a state income tax on resident trusts does not violate the Due Process Clause or the Commerce Clause of the United States Constitution?

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THE CHASE MANHATTAN BANK, ELIZABETH B. PARRY and HARRISON F. DURAND, as Trustees of a Trust under the Will of Sidney L. Parry, Deceased, for the Benefit of Elizabeth B. Parry et al.;

THE CHASE MANHATTAN BANK and DR. BERNARD L. PACELLA, as Trustees of a Trust under the Will of John Dallett, Deceased, for the Benefit of John Dallett, Jr.;

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under the Will of Elvira R. Evens, Deceased, for the Benefit of Grace Evens Stewart;

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under the Will of James N. Worcester, Deceased, for the Benefit of James N. Worcester, Jr.; and

THE CHASE MANHATTAN BANK, as sole Trustee of a Trust under Agreement dated March 16, 1955 by Charles Anderson Dana for the Benefit of Sandra Leigh Dana Adolfsson,

Petitioners,

v.

GENE GAVIN, Commissioner of Revenue Services of the State of Connecticut,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises out of the imposition in 1993 of the Connecticut state income tax on five Connecticut resident trusts. The Connecticut Supreme Court upheld a summary judgment in favor of the respondent Gene Gavin, Commissioner of Revenue Services of the State of Connecticut, based on a stipulation of facts. Pet. App. 49a.

The petitioner bank is the trustee of four testamentary trusts and one inter vivos trust. All of the trusts are resident trusts as defined by the Connecticut General Statutes and are subject to the Connecticut income tax. Conn. Gen. Stat. §§ 12-700(a) and 12-701(a)(4). Resp. App. A2 and A3. Each testamentary trust consists of property transferred by will of a decedent who at the time of his death was a resident of the state of Connecticut. Conn. Gen. Stat. § 12-701(a)(4)(C). Resp. App. A3. The wills that created the trusts were admitted to probate in Connecticut probate courts shortly after each testator's death. The inter vivos trust is an irrevocable trust consisting of the property of a person who was a resident of Connecticut at the time the property was transferred to the trust, Conn. Gen. Stat. § 12-701(a)(4)(D), and whose sole income beneficiary is a Connecticut domiciliary. Resp. App. A3. Neither the trustee nor the trust assets are located in the state of Connecticut. The assets of all of the trusts for 1993 consisted solely of cash and securities held in accounts of the petitioner bank as trustee.

REASONS FOR DENIAL OF THE PETITION

I. THE CONNECTICUT SUPREME COURT DECISION ACCORDS WITH CONTROLLING UNITED STATES SUPREME COURT DECISIONS, AND SATISFIES THE DUE PROCESS AND COMMERCE CLAUSES OF THE UNITED STATES CONSTITUTION.

A. The Due Process Clause

Contrary to the petitioner's claim, this case not only accords with Supreme Court precedent, it is mandated by this Court's ruling in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). In *Quill*, the Court rejected the notion that a corporation's lack of physical presence in the taxing state rendered any attempt by the state to tax the corporation's activities a violation of Due Process. *Id.* at 308. The Court upheld a North Dakota law requiring all corporations that regularly solicit business in the state to collect a use tax on property purchased for storage, use, or consumption within North Dakota, even if the corporation had no physical presence within the state. *Id.* at 302-03.

In *Quill*, the Court unified the Due Process analysis in the area of in personam jurisdiction with the Due Process analysis for jurisdiction to tax. The Court stated:

> Our due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess*, particularly in the area of judicial jurisdiction. Building on the seminal case of *International Shoe Co. v. Washington*, 326 US. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945),

> we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.*, at 316, 66 S.Ct. at 158 (Quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940)). In that spirit, we have abandoned more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State.

Id. at 307. The Court concluded:

> Thus, to the extent that our decisions have indicated the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.

Id. at 308.

Although *Quill* concerned a use tax and the present case concerns an income tax, the *Quill* Due Process analysis and rule of law applies to this case with equal force. "The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Id.* at 306, *quoting Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-345 (1954). A state can impose taxes constitutionally if "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state."

Wisconsin v. J.C. Penney, Co., 311 U.S. 435, 444 (1941). The "simple but controlling question is whether the state has given anything for which it can ask return." *Id.*

In the present case, the Connecticut Supreme Court recognized that the *Quill* statement of the minimum contacts test in tax jurisprudence has superseded the earlier physical presence requirement, and correctly stated the issue as whether "the contacts between the testamentary trusts and Connecticut are sufficient constitutionally for Connecticut to treat the trusts as if they were domiciliaries of the state and, therefore, for Connecticut to tax the undistributed income of the trusts." *Chase Manhattan Bank, Trustee v. Gene Gavin, Commissioner of Revenue Services*, 249 Conn. 172, 188 (1999) Pet. App. 16a. The Court then proceeded painstakingly to analyze the contacts between the trusts and Connecticut, and concluded:

> the viability of the trust as a legal entity is inextricably intertwined with the benefits and opportunities provided by the legal and judicial systems of Connecticut, and its legal viability is inextricably intertwined with its economic vitality. Neither its economic vitality nor its legal viability trumps the other for purposes of due process and taxation. These contacts with Connecticut are sufficiently "fiscal" in nature to satisfy the due process clause, and gave the testamentary trusts fair warning that they were subject to its tax jurisdiction.

Id. at 200, Pet. App. 30a.

As the Court discussed, the contacts between Connecticut and the testamentary trusts easily fulfills the Due Process criteria. First, the trusts were created by Connecticut residents to benefit those of their choosing. The trusts

owe their existence to Connecticut law. In creating these testamentary trusts, the settlors exercised a right or a privilege granted by Connecticut law.[1/] "Connecticut's laws assure the continued existence of the trusts as mechanisms for the disposition of the testators' property according to the terms of the trusts as provided by the respective wills." *Chase Manhattan Bank, Trustee v. Gene Gavin Commissioner of Revenue Services*, 249 Conn. at 193. Pet. App. 21a.

The probating of the trusts in Connecticut is also a substantial contact, giving Connecticut courts ongoing powers over the trusts pursuant to Connecticut law.[2/] Once

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1/ "All of the testamentary trusts were established under their respective wills because the laws of [the state of Connecticut] provide for such establishment." *Chase Manhattan Bank, Trustee v. Gene Gavin Commissioner of Revenue Services*, 249 Conn. 172, 192 (1999), Pet. App. 21a, *citing Blodgett v. Bridgeport City Trust Co.*, 115 Conn. 127, 142 (1932).

2/ In addition to approving the appointment of Chase Manhattan (or a predecessor bank) as trustee, each Connecticut Court pursuant to the General Statutes had the authority:

> (1) To call the executor to account for the trust estate. Conn. Gen. Stat. § 45a-98, Resp. App. A6; (2) to require a bond of the trustee under appropriate circumstances even where the will excuses a bond. Conn. Gen. Stat. § 45a-473, Resp. App. A18; (3) to fill a vacancy in the office of trustee if a trustee were to resign or decline to serve; Conn. Gen. Stat. § 45a-474, Resp. App. A19; (4) to remove a testamentary trustee for cause and fill the vacancy thereby created. Conn. Gen. Stat. § 45a-242, Resp. App. A16; (5) To authorize the sale of real estate held by the trustee. Conn. Gen. Stat. § 45a-164, Resp. App. A7; (6) to require the trustee to render periodic accounts, to hold hearings upon interim and final accounts, to pass on the propriety of such accounts, and to make such orders as are necessary to secure the due execution of the trustee's duties. Conn. Gen.

again Connecticut law is relied upon for the review, approval and protection of the trusts. The specific duties of the probate courts varied as to each trust, but in all events the trusts were protected by the requirement for a final accounting, statutory standards for trustees, and the availability of a forum in which to litigate issues relating to the trust. Conn. Gen. Stat. §§ 45a-175, and 45a-177, 45a-178 and 45a-179.[3/] Resp. App. A12-A15. If at any time any beneficiary wishes to question the administration of the trust by the trustee, the Connecticut Probate Court would have jurisdiction to resolve the dispute.[4/] Like the individual domiciliary, the resident trust may invoke the protection of

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Stat. §§ 45a-177, 45a-178 and 45a-179, Resp.App. A12-A15; (7) upon the allowance of interim and final accounts, to determine the rights of the trustee and the interested parties. Conn. Gen. Stat. §§ 45a-175, 45a-177, 45a-178 and 45a-179, Resp. App. A12-15; and (8) to make appropriate orders regarding the distribution of the trust assets upon its termination. Conn. Gen. Stat. §§ 45a-481 through 45a-483, Resp. App A20-A22.

3/ In the case of the Dallett and Worcester trusts, there were periodic renderings of accounts as required by Conn. Gen. Stat. § 45a-177. For the Worcester trust there were thirty-two annual filings until 1969, two biannual filings from 1969 to 1971, and eight triennial accountings since 1971. Chemical Bank, as co-trustee, filed six periodic reports for the Dallet trust. As to the Stewart trust, although triennial accountings were excused by the decedent's will, the trustee was required and did file a 70 page final accounting with the probate court. A final accounting is also required in the Parry testamentary trust.

4/ The Connecticut courts determine and settle the rights between and among trustee, beneficiaries, and successor trustee, if any. Questions, such as the propriety of investments, may be raised in the Connecticut courts, and if appropriate, the court may refuse to approve the interim or final accounting absent corrective measures.

Connecticut law and thus be responsible to share the costs of government.

A testamentary trust of a state resident, which has been probated in the courts of the state, has a relationship to the state distinct from the relationship, if any, between the state and the trustee or trust assets. The state's power to resolve disputes over the trust and to order accountings to protect the trust corpus and beneficiaries from potential malfeasance by the trustee reflects the state's justifiable jurisdiction over the trust. *Chase Manhattan Bank, Trustee v. Gene Gavin Commissioner of Revenue Services, supra*, 249 Conn. at 201, Pet. App. 31a, *quoting District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539, 540 (D.C. App. 1997).

The Connecticut Supreme Court applied the same minimal contacts analysis to the inter vivos trust. First, the noncontingent beneficiary of the inter vivos trust is a Connecticut domiciliary. As a Connecticut domiciliary she has enjoyed all of the protections and benefits afforded to other domiciliaries. Her right to the eventual receipt and enjoyment of the accumulated income is protected by the laws of Connecticut. *Id.* at 204, Pet. App. 35a.

Connecticut courts also have jurisdiction to entertain actions by trustees, settlors or beneficiaries of inter vivos trusts to require accounting of actions taken by the trustee. Conn. Gen. Stat. § 45a-175. Resp. App. A9. *See United States Trust Co. v. Bohart*, 197 Conn. 34 (1985). Furthermore, the probate court has the authority, on its own motion or upon the application and complaint of an interested person, to remove a trustee for misconduct or neglect in the exercise of his or her duties. Conn. Gen. Stat. § 45a-242. Resp. App. A16. The Connecticut Supreme Court concluded, "just as a state may tax all of the present income of a domiciliary, irrespective of its place or origin or the nature

of its source, a state may, on the basis of the same justification, tax the income of an inter vivos trust that is accumulated for the ultimate benefit of a noncontingent domiciliary, and that is subject to her ultimate power of disposition. " *Chase Manhattan Bank, Trustee v. Gene Gavin, Commissioner of Revenue Services*, 249 Conn. at 205, Pet. App. 35a, *citing McCulloch v. Franchise Tax Board*, 61 Cal. 2d 186, 390 P.2d 412, appeal dismissed, 379 U.S. 133 (1964).

These contacts, benefits, and protections are more than enough to subject the trust income to taxation in the state of Connecticut. The trusts were created in this state, by Connecticut residents, and they reside in the state, benefit from the protection of state law, and are protected by the state probate courts, regardless of the physical presence of the trustee or trust assets.

Accordingly, the Court correctly applied controlling Supreme Court authority to conclude that the resident trust tax satisfies due process requirements. To avoid this result, the petitioner argues that *Safe Deposit & Trust Co. of Baltimore, Md. v. Commonwealth of Virginia*, 280 U.S. 83 (1929), a seventy-year old case based on the superseded physical presence and double taxation analyses, controls here. This claim is erroneous for several reasons. First, *Quill* specifically overrules prior decisions requiring physical presence in a State for the imposition of a tax, because such decisions have been "superseded by developments in the law of due process." *Quill Corporation v. North Dakota, supra*, 504 U.S. at 308. Second, *Safe Deposit's* focus on the avoidance of a double tax by concentrating on physical presence has been discredited. The "risk of double taxation of intangibles has long been abandoned as a limitation on taxation under the due process clause. *Curry v. McCanless*, 307 U.S. 357, 363, 59 S.Ct. 900 (1939)." *Chase Manhattan Bank, Trustee v. Gene Gavin, Commissioner of*

Revenue Services, *supra*, 249 Conn. at 206-207, Pet. App. 37a. Furthermore, the Supreme Court has affirmed that a domiciliary of a state who is a beneficiary of an out-of-state trust may be taxed on the trust income received by her, even though the other state also taxed the value of the trust property that generated the income. *Guaranty Trust Co. v. Virginia*, 305 U.S. 19 (1938).

In addition, *Safe Deposit* is factually distinguished because it involves an *ad valorem* tax on an inter vivos trust whereas this case involves an income tax. In *Safe Deposit*, a Virginia domiciliary transferred to the Safe Deposit & Trust Company of Baltimore, Maryland by deed, $50,000 in stocks and bonds for the benefit of his two sons. The court found that only the state where the property was located, Maryland, had the authority to impose an *ad valorem* tax. As discussed above, it is well established that a state may tax all of the income of one of its domiciliaries, irrespective of the source of that income, geographical or otherwise. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). The relationship between the state of Connecticut and the trusts at issue in this case are sufficiently close to justify the state's treatment of the trusts as residents for purposes of income taxation.

Accordingly, the Connecticut Supreme Court decision here did not "overrule" *Safe Deposit*, as the petitioner asserts, petitioner's brief at 20, nor does it conflict with controlling Supreme Court precedent. Rather, it correctly applies current Supreme Court law as articulated in *Quill*.

B. The Commerce Clause

Similarly, the Connecticut Court correctly applied longstanding Supreme Court precedent to conclude that the

resident trust tax comports with the Commerce Clause.[5] Under the established criteria set forth by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the income tax on the resident trusts does not violate the Commerce Clause. In *Quill*, the Court reiterated the *Complete Auto* test: "[W]e will sustain a tax against a Commerce Clause challenge so long as the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Quill Corp. v. North Dakota*, *supra*, 504 U.S. at 311.

"The first and fourth prongs, which require a substantial nexus and relationship between the tax and state-provided services, limit the reach of the state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill Corp. v. North Dakota*, *supra*, 504 U.S. at 313. The first and fourth prongs of the *Complete Auto* test are closely connected to the nexus requirement of Due Process. As discussed in detail above, the protection, opportunities and benefits given by the state to the creation and maintenance of the trusts satisfy the first and fourth prongs of the Commerce Clause test. As the court below concluded, the creation of the trusts under Connecticut law, the primary jurisdiction of its courts, the absolute requirement of a final accounting, the situs of the trust in the state, and the other contacts discussed above, constitute sufficient minimal contacts and a substantial nexus to Connecticut.

In addition, with regard to the fourth prong, the income tax is a general revenue tax (as distinguished from a

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[5] The petitioner does not argue that the Connecticut Supreme Court's decision conflicts with any specific ruling of this or other courts with regard to the Commerce Clause.

user charge for specified state-provided services). As a general revenue measure, it is "a means of distributing the burden of the costs of government." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981) *quoting Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937). The trust entity's domicile in Connecticut also constitutes the basis of a tax on all income. *Oklahoma Tax Commission v. Chickasaw Nation, supra*, 515 U.S. 450.

Similarly, the resident trust income tax satisfies the second and third prongs of the *Complete Auto* test. Although the petitioner's entire focus is on the risk of possible multiple taxation without provision for apportionment, there is no actual multiple taxation. The Connecticut Supreme Court rejected the petitioner's speculation that a Connecticut testator or settlor would choose a Connecticut bank over an out-of-state bank, as trustee solely because of the potential for future multiple taxation of some portion of the trust's future income. *Chase Manhattan Bank, Trustee v. Gene Gavin, Commissioner of Revenue Services, supra*, 249 Conn. at 212-213, Pet. App. 42a-43a. "The choice of bank as trustee is likely to be animated by many imponderables, among them: the prior experience of the testator or settlor; the financial performance of the various banks in the pool of available choices; the current location of the likely beneficiaries; the current location of the various banks in the pool; and, of course, the tax implications, if any. We simply are not sufficiently persuaded of the underlying multifaceted decision as the choice of a trustee is likely to be made." *Id.* This analysis and conclusion fully comports with a recent decision of this Court: "'The degree to which these very general suggestions might prove right or wrong, however, is not really significant; the point is simply that all of them are nothing more than suggestions, pointedly couched in terms

of assumption or supposition.'" *Id.* at 213, Pet. App. 43a, *quoting General Motors Corp. v. Tracy*, 519 U.S. 278, 308-309 (1997) (Court held that Ohio's differential tax treatment of natural gas sales by public utilities and independent marketers did not violate the Commerce Clause).

Moreover, apportionment is provided by the availability of a credit for taxes paid to another jurisdiction on income derived from real or tangible personal property, or from a business, trade, occupation or profession. Conn. Gen. Stat. § 12-704(a). Resp. App. A5. Although the credit does not extend to income derived from intangible personalty, such as dividends and interest, the state is not required to provide apportionment as to that income, because the taxation of the trusts is comparable to the taxation of Connecticut residents on income earned on intangibles.[6] "The Supreme Court has long recognized that a state may tax the entire income of an individual residing in that state regardless of the source of the income: 'Domicil[e] itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government.'" *District of Columbia v. Chase Manhattan Bank*, *supra*, 689 A.2d at 545 *quoting New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937). In addition, not all risks of multiple taxation run afoul of the dormant Commerce Clause, because it is not the purpose of the clause to relieve those engaged in interstate commerce from bearing their fair share of the state tax burdens. *Complete Auto Transit, Inc. v. Brady*, *supra*, 430 U.S. at 279.

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[6] As the court below held, the relationship between the state of Connecticut and the trusts are sufficiently close to justify the state's treatment of the trusts as residents for purposes of income taxation. *Chase Manhattan Bank, Trustee v. Gene Gavin, 249 Conn. at 203*, Pet. App. 33a. *See also District of Columbia v. Chase Manhattan Bank*, *supra*, 689 A.2d at 545.

Therefore, even if multiple taxation were to occur at some time in the future, there would be no violation of the Commerce Clause, because the taxation of these trusts is comparable to the taxation of Connecticut residents on income earned on intangibles. *See Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995).[7]

Finally, with regard to the third prong of the *Complete Auto* test, the resident trust income tax does not discriminate against interstate commerce. There is no discrimination based upon location of trustees. Connecticut trustees are not entitled to any exclusive benefits, credits or deductions, and no extra burdens are borne by out-of-state trustees.

In sum, the Connecticut Supreme Court fully and correctly applied controlling precedent of this Court to conclude that the *Complete Auto* test is satisfied and there is absolutely no basis for the petitioner's challenge under the Commerce Clause.

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[7] *See also Guaranty Trust Co. v. Virginia*, 305 U.S. 19 (1938) (Court held that a domiciliary of a state who is a beneficiary of an out-of-state trust may be taxed on the trust income received by her, even though the other state also taxed the value of the trust property that generated the income); *Greenough v. Tax Assessor*, 331 U.S. 486, 490 (1947) (Court held that state where trustee resided had authority to impose an *ad valorem* tax on intangibles held by an out-of-state trust and Court noted interests of the state which is the "seat of a testamentary trust").

II. THE CONNECTICUT SUPREME COURT DECISION DOES NOT CONFLICT WITH ANY OTHER STATE COURT DECISIONS POST-*QUILL*.

The petitioner also attempts to manufacture a conflict between the Connecticut decision below and the decisions of the highest courts of other states. To support this argument, the petitioner cites decisions by other states that were issued before *Quill*, and which rest on the same outmoded due process analyses that were rejected in *Quill*.[8/]

The fact of the matter is that the Connecticut decision here accords with the only other state court case on this subject that has followed and applied *Quill*, *District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. App. 1997). As that court stated, rejecting a similar argument in that case from the same petitioner, "[T]hese cases -- all decided before the Supreme Court's 1992 decision in *Quill* -- take an overly formalistic view of the due process analysis and rely far too heavily on the presence of persons and tangible property within the taxing jurisdiction." *District of Columbia v. Chase Manhattan Bank*, *supra*, 689 A.2d at 545. "*Quill* explicitly rejected the idea that a state's power to tax turns on the physical presence of the taxed entity within the taxing jurisdiction." *Id.* at 546. The *District of Columbia* court upheld a resident trust income tax on a trust created by the will of an individual who died while domiciled in the District, where the trustee, trust assets, and

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[8/] The petitioner cites the following cases that were issued before *Quill*: *Swift v. Director of Revenue*, 727 S.W.2d 880 (Mo. 1987); *Blue v. Department of Treasury*, 462 N.W.2d 762 (Mich. Ct. App. 1990); *Pennoyer v. Taxation Div. Dir.*, 5 N.J. Tax 386, 397 (Tax Ct. 1983); *Taylor v. State Tax Comm'n*, 85 A.D. 2d 821, 822 (3rd Dep't. 1981); *Potter v. Taxation Div. Dir.*, 5 N.J. Tax 399 (1983).

trust beneficiaries were all located outside the District. *Id.* at 540.

Any previous division among the state courts has clearly been resolved by the thorough due process analysis and standard set forth in *Quill*. The Connecticut Supreme Court's decision in this case and the District of Columbia's ruling in *Chase Manhattan Bank* demonstrate that the rule of law in *Quill* provides the guidance and controlling precedent for the issues raised in this petition. Certification is not necessary or appropriate because the state courts are properly applying the Due Process standard articulated in *Quill*. Petitioners here ask the Court to reopen a settled question in the hope that they can have the law changed in their favor.

The numerous legal benefits and opportunities of resident trusts are comparable to those legal benefits and opportunities that justify the imposition of taxes on the income of individual domiciliaries of the state. As found by the Connecticut Supreme Court, the Due Process criteria set forth in *Quill* is more than adequately met in the case of these resident trusts.

CONCLUSION

The Connecticut Supreme Court's decision in this case is consistent with this Court's rulings in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992) and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), does not conflict with the decisions of any other state or federal courts applying this precedent and fully and correctly analyzes federal constitutional requirements as they apply to this case. Accordingly, review by the Court is not warranted and respondent respectfully requests that the petition be denied.

Respectfully submitted,

RESPONDENT
GENE GAVIN, COMMISSIONER OF REVENUE SERVICES OF THE STATE OF CONNECTICUT

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No. 99-366

In The
Supreme Court Of The United States

THE CHASE MANHATTAN BANK, ELIZABETH B. PARRY and HARRISON F. DURAND, as Trustees of a Trust under the Will of Sidney L. Parry, Deceased, for the Benefit of Elizabeth B. Parry et al.;

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX

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Sec. 12-700. Imposition of tax on income. Rate. (a) There is hereby imposed on the Connecticut taxable income of each resident of this state a tax at the rate of four and one-half per cent of such Connecticut taxable income for taxable years commencing on or after January 1, 1992. The provisions of this subsection shall apply to resident trusts and estates and, wherever reference is made in this subsection to residents of this state, such reference shall be construed to include resident trusts and estates, provided any reference to a resident's Connecticut adjusted gross income derived from sources without this state or to a resident's Connecticut adjusted gross income shall be construed, in the case of a resident trust or estate, to mean the resident trust or estate's Connecticut taxable income derived from sources without this state and the resident trust or estate's Connecticut taxable income, respectively.

. . .

(d) The provisions of this chapter shall be applicable with respect to any person, trust or estate. Whenever, in this chapter, "any person" appears without "trust or estate", the reference to any person shall be deemed to include any trust and any estate unless, in the context of the particular provision, the reference to any person could not be applicable in the case of a trust or in the case of an estate.

Sec. 12-701. Definitions. (a) For purposes of this chapter:

(1) "Resident of this state" means any natural person (A) who is domiciled in this state, provided if a person (i) maintains no permanent place of abode in this state, (ii) maintains a permanent place of abode elsewhere and (iii) spends in the aggregate not more than thirty days of the taxable year in this state, such person shall be deemed not a resident or (B) who is not domiciled in this state but maintains a permanent place of abode in this state and is in this state for an aggregate of more than one hundred eighty-three days of the taxable year, unless such person, not being domiciled in this state, is in the armed forces of the United States.

. . .

(4) "Resident trust or estate" means (A) the estate of a decedent who at the time of his death was a resident of this state, (B) the estate of a person who, at the time of commencement of a case under Title 11 of the United States Code, was a resident of this state, (C) a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at the time of his death was a resident of this state, and (D) a trust, or a portion of a trust, consisting of the property of (i) a person who was a resident of this state at the time the property was transferred to the trust if the trust was then irrevocable, (ii) a person who, if the trust was revocable at the time the property was transferred to the trust, and has not subsequently become irrevocable, was a resident of this state at the time the property was transferred to the trust or (iii) a person who, if the trust was revocable when the property was transferred to the trust but the trust has subsequently become irrevocable, was a

resident of this state at the time the trust became irrevocable. For purposes of this chapter, if any trust or portion of a trust, other than a trust created by the will of a decedent, has both resident and nonresident noncontingent beneficiaries, the Connecticut taxable income of the trust, as defined in subdivision (9) of this subsection, shall be modified as follows: The Connecticut taxable income of the trust shall be the sum of all such income derived from or connected with sources within this state and that portion of such income derived from or connected with all other sources which is derived by applying to all such income derived from or connected with all other sources a fraction the numerator of which is the number of resident noncontingent beneficiaries and the denominator of which is the total number of noncontingent beneficiaries. As used in this subdivision, "noncontingent beneficiary" means a beneficiary whose interest is not subject to a condition precedent.

Sec. 12-704. Credits for income taxes paid to other states. (a) Any resident or part-year resident of this state shall be allowed a credit against the tax otherwise due under this chapter in the amount of any income tax imposed on such resident or part-year resident for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia or any province of Canada on income derived from sources therein and which is also subject to tax under this chapter. In the case of a resident, the credit provided under this section shall not exceed the proportion of the tax otherwise due under this chapter that the amount of the taxpayer's Connecticut adjusted gross income derived from or connected with sources in the other taxing jurisdiction bears to such taxpayer's Connecticut adjusted gross income under this chapter. In the case of a part-year resident, the credit provided under this section shall not exceed the proportion of the tax otherwise due during the period of residency under this chapter that the amount of the taxpayer's Connecticut adjusted gross income derived from or connected with sources in the other jurisdiction during the period of residency bears to such taxpayer's Connecticut adjusted gross income during the period of residency under this chapter, nor shall the allowance of the credit provided under this section reduce the tax otherwise due under this chapter to an amount less than what would have been due if the income subject to taxation by such other jurisdiction were excluded from Connecticut adjusted gross income.

Sec. 45a-98. General powers. Courts of probate in their respective districts shall have the power to grant administration of intestate estates of persons who have died domiciled in their districts and of intestate estates of persons not domiciled in this state which may be granted as provided by section 45a-303, to admit wills to probate of persons who have died domiciled in their districts or of nondomiciliaries whose wills may be proved in their districts as provided in section 45a-287, and to call executors, administrators, trustees, guardians and conservators to account concerning the estates entrusted to their charge, and to make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the laws of this state.

Sec. 45a-164. Sale or mortgage of real property. (a) Upon the written application of the conservator of the estate of any person, guardian of the estate of any minor, administrator or trustee appointed by the court, including a trustee of a missing person, or the executor or trustee under any will admitted to probate by the court, after public notice and other notice which the court may order and after hearing, the court may authorize the sale or mortgage of the whole or any part of, or any easement or other interest in, any real property in this state of such person, minor, missing person, deceased person or trustee, or of any real property the legal title to which has been acquired by such administrator, executor or trustee, if the court finds it would be for the best interest of the parties in interest to grant the application.

(b) The court may empower the conservator, guardian, administrator, executor or trustee to execute a conveyance of such property or to execute a note and a mortgage to secure such property upon giving a probate bond faithfully to administer and account for the proceeds of the sale or mortgage according to law, unless the court finds that there in force, for such fiduciary, a probate bond in an amount and with security determined in accordance with section 45a-139 or unless the bond is dispensed with in accordance with section 45a-169. The application shall set forth a description of the property to be sold or mortgaged.

(c) After a hearing, the court may authorize that the property be sold to the fiduciary either directly or under the provisions of section 45a-167, except that if a public sale is ordered, the fiduciary may be the purchaser only if the sale is made under section 45a-167. In the case of any

proposed sale to a fiduciary, any notice sent to interested parties and any public notice shall indicate that the fiduciary is the proposed purchaser.

(d) If any person having an interest in such real property is not in being or is not ascertained or is under a disability, the court shall appoint a guardian ad litem to represent the interest of such person at the hearing. A guardian ad litem shall not be necessary if such person is represented by a guardian or by a conservator, unless the sale of the property is to such guardian or conservator or such guardian or conservator has a potential conflict as an applicant or otherwise.

(e) The order and the sale or mortgage under the order shall be conclusive upon all persons then or thereafter existing whose interests have been so represented.

Sec. 45a-175. Jurisdiction of accounts of fiduciaries. Appointment of auditor to examine accounts, when. (a) Courts of probate shall have jurisdiction of the interim and final accounts of testamentary trustees, trustees appointed by the courts of probate, conservators, guardians, persons appointed by probate courts to sell the land of minors, executors, administrators and trustees in insolvency, and, to the extent provided for in this section, shall have jurisdiction of accounts of the actions of trustees of inter vivos trusts and attorneys-in-fact acting under powers of attorney created in accordance with section 45a-562.

(b) A trustee or settlor or an inter vivos trust or an attorney-in-fact or the grantor of such power of attorney may make application to the court of probate for the district where the trustee or the attorney-in-fact has his or its principal place of business or to the court of probate for the district where the trustee or any one of them or the settlor or the attorney-in-fact or the grantor of the power resides or, in the case of a deceased settlor or grantor, to the court of probate having jurisdiction over the estate of the settlor or grantor for submission to the jurisdiction of the court of an account for allowance of the trustee's or attorney's actions under such trust or power.

(c)(1) Any beneficiary of an inter vivos trust may petition a court of probate having jurisdiction under this section for an accounting by the trustee or trustees. The court may, after hearing with notice to all interested parties, grant the petition and require an accounting for such periods of time as it determines are reasonable and necessary on finding that: (A) The beneficiary has an interest in the trust sufficient to entitle him to an accounting, (B) cause has been

shown that an accounting is necessary, and (C) the petition is not for the purpose of harassment.

(2) A court of probate shall have jurisdiction to require an accounting under subdivision (1) of subsection (c) of this section if (A) a trustee of the trust resides in its district, (B) in the case of a corporate trustee, the trustee has its principal place of business in the district, (C) any of the trust assets are maintained or evidences of intangible property of the trust are situated in the district, or (D) the settlor resides in the district.

(3) As used in subdivision (1) of subsection (c) of this section, "beneficiary" means any person currently receiving payments of income or principal from the trust, or who may be entitled to receive income or principal or both from the trust at some future date, or the legal representative of such person.

(d) The action to submit an accounting to the court, whether by an inter vivos trustee or attorney acting under a power of attorney created in accordance with section 45a-562 or whether pursuant to petition of another party, shall not subject the trust or the power of attorney to the continuing jurisdiction of the probate court.

(e) If the court finds such appointment to be necessary and in the best interests of the estate, the court upon its own motion may appoint an auditor to be selected from a list provided by the probate court administrator, to examine accounts over which the court has jurisdiction under this section, except those accounts on matters in which

the fiduciary or cofiduciary is a corporation having trust powers. The probate court administrator shall promulgate regulations in accordance with section 45a-77 concerning the compilation of a list of qualified auditors. Costs of the audit may be charged to the fiduciary, any party in interest and the estate, in such proportion as the court shall direct if the court finds such charge to be equitable. Any such share may be paid from the fund established under section 45a-82, subject to the approval of the probate court administrator, if it is determined that the person obligated to pay such share is unable to pay or to charge such amount to the estate would cause undue hardship.

(f) Upon the allowance of any such account, the court shall determine the rights of the fiduciaries or the attorney-in-fact rendering the account and of the parties interested in the account, subject to appeal as in other cases. The court shall cause notice of the hearing on the account to be given in such manner and to such parties as it directs.

Sec. 45a-177. Periodic rendering of accounts; hearing. Nature of account. Exceptions. (a) All conservators, guardians, persons appointed by the court of probate to sell land of minors and trustees, including those entrusted with testamentary trusts unless excused by the will creating the trust, shall render periodic accounts of their trusts under oath to the court of probate having jurisdiction for allowance, at least once during each three-year period and more frequently if required to do so by the will or trust instrument creating the trust. Periodic accounts for filing only may be submitted to the court at any time during each three-year period. Upon receipt of a periodic account, the court shall cause notice of it and of its availability for examination at the court to be given in such manner and to such parties as it deems reasonable. Any such party may apply to the court for a hearing on the account. If an application for such a hearing is not received by the court from a party in interest within the time stated in the notice, the periodic account will be filed without hearing thereon and without allowance or disallowance thereof, and shall not be recorded. At the end of each three-year period from the date of the last allowance of a periodic account, or upon the earlier receipt of a final account, there shall be a hearing on all periodic accounts not previously allowed, and the final account, if any, in accordance with sections 45a-178 and 45a-179.

(b) Each such periodic account shall include an inventory of the trust estate showing fully how the principal of the fund is invested and the items of income and expenditure. If there has been no change in the identity of the items comprising the principal of the fund since the last account which has been accepted and approved, it shall not be necessary to include an inventory of the trust estate.

(c) If the estate held by any person in any such fiduciary capacity is less than two thousand dollars, or, in the case of a corporate fiduciary under the supervision of the commissioner of banking or any other fiduciary bonded by a surety company authorized to do business in this state, ten thousand dollars, he shall be not required to render such account unless so ordered by the court.

Sec. 45a-178. Allowance of interim accounts. Notice and hearing. The court of probate shall direct what notice, if any, shall be given to the parties in interest of the filing of any account described in section 45a-177, and of the hearing thereon, and may adjust and allow the account. The court may make any order necessary and proper to secure the execution of the duties of such fiduciary, subject to appeal as in other cases.

Sec. 45a-179. Notice and hearing on final accounts. When an executor, administrator, conservator, guardian, trustee in insolvency or trustee of a testamentary trust exhibits his final account to the court of probate for allowance, the court shall appoint a time and place for a hearing on the account and shall cause notice of the hearing to be given as it directs. Such fiduciary shall swear or affirm under oath to the truth of the account.

Sec. 45a-242. Replacement of fiduciary. (a) **Removal of fiduciary for cause.** If any fiduciary becomes incapable of executing his trust, neglects to perform the duties of his trust, wastes the estate in his charge, or fails to furnish any additional or substitute probate bond ordered by the court, the court of probate having jurisdiction may, upon its own motion, or upon the application and complaint of any person interested or of the surety upon the fiduciary's probate bond, after notice and a hearing, remove such fiduciary.

(b) **Resignation of fiduciary.** The court of probate, after notice and hearing, may accept or reject the written resignation of any fiduciary, but such resignation shall not be accepted until such fiduciary has fully and finally accounted for the administration of his trust to the acceptance of such court.

(c) **Resignation or removal of testamentary trustee or guardian.** Trustees appointed by a testator to execute a trust created by will and testamentary guardians may resign or be removed, and the vacancies filled by the court having jurisdiction in the manner provided under this section, unless otherwise provided by the will.

(d) **Appointment of successor fiduciary. Bond.** Except as otherwise provided in subsection (c) of this section, upon the death, removal or acceptance of the resignation of any fiduciary before the completion of his duties, the court of probate may appoint a suitable person to fill the resultant vacancy and such successor fiduciary shall give a probate bond.

(e) Effect on lawsuits. All suits in favor of or against the original fiduciary shall survive to and may be prosecuted by or against the person appointed to succeed him.

Sec. 45a-473. Bonds of testamentary trustees. When a testator has appointed a trustee to execute a trust created by his will, the court of probate having jurisdiction of the settlement of his estate shall, unless otherwise provided in the will, require of such trustee a probate bond. If any trustee refuses to give such bond, the refusal shall be deemed a refusal to accept or perform the duties of such trust; but the bond without surety of any public or charitable corporation or cemetery association to which any bequest or devise is made in trust shall be deemed sufficient. Whenever by any will it is provided that the trustee or trustees thereunder shall not be required to give a probate bond, or shall be required to give a bond which in the judgment of the court of probate having jurisdiction is insecure or inadequate, the court may, upon the application of any person interested, require such trustee or trustees at any time to furnish a probate bond in accordance with section 45a-139.

Sec. 45a-474. Vacancies in office of trustee.
When any person has been appointed trustee of any estate, or holds as trustee the proceeds of any estate sold, and no provision is made by law or by the instrument under which his appointment is derived for the contingency of his death or incapacity or for his refusal to accept such trust or for his resignation of such trust, or when a trust has been created by will and no trustee has been appointed in the will or when more than one trustee has been appointed and thereafter a trustee so appointed dies, becomes incapable, refuses to accept or resigns such trust, the court of probate of the district within which the estate is situated, or, when the trust has been created by will, in the district having jurisdiction of such will, may, on the happening of any such contingency, appoint some suitable person to fill such vacancy, taking from him a probate bond, unless in the case of a will it is otherwise provided therein, in which case the provisions of section 45a-473 shall apply.

Sec. 45a-481. Distribution by testamentary trustee upon completion of trust. The trustee of any testamentary trust which has terminated may, unless the will creating the trust otherwise directs, after settling his final account, deliver the property remaining in his hands to the remainderman upon the order of the probate court, without returning the same to the estate of the decedent.

Sec. 45a-482. Distribution of assets of inoperative trust. When the facts at the time of distribution from an estate to a trust or from a testamentary trust to a successive trust are such that no trust would be operative under the terms of the instrument creating such trust or successive trust because of the death of the life tenant, or because the beneficiary has reached a stipulated age, or for any other reason, the fiduciary of such estate or prior trust may distribute, with the approval of the court of probate having jurisdiction, directly from the estate or prior trust to the remaindermen of such trust, the corpus of such trust and any income earned during the period of estate administration or administration of the prior trust and distributable to such remaindermen, without the interposition of the establishment of such trust or successive trust.

Sec. 45a-483. Settlement of trust estate when beneficiary has been absent seven years. The trustee of any trust for the benefit of any person who has been absent from his home and unheard of for seven years or more may settle his account as such trustee in the court of probate having jurisdiction thereof. Upon the order of the court, the trustee shall distribute such trust estate to the persons entitled to the remainder thereof as determined by the court, and the trustee shall not thereafter be liable to any such absent beneficiary, his heirs, executors, administrators or assigns in any action for such trust estate or any interest therein or income thereof. A person shall not be entitled to receive any portion of such estate from the trustee until such person has filed in the court of probate a bond with surety to the acceptance of the court, payable to the state, conditioned to return such trust estate to the trustee or his successor on the reappearance of the person presumed to be dead within thirteen years from the date of such order authorizing distribution. After the expiration of such thirteen-year period, such person entitled to the remainder shall not be liable to any such absent beneficiary, his heirs, executors, administrators or assigns in any action for such trust estate or any interest therein or income thereof.

Supreme Court, U.S.
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No. 99-366

IN THE

Supreme Court of the United States

THE CHASE MANHATTAN BANK, ELIZABETH B. PARRY and HARRISON F. DURAND, as Trustees of a Trust under the Will of Sidney L. Parry, Deceased, for the Benefit of Elizabeth B. Parry, *et al.*,

Petitioners,

v.

GENE GAVIN, Commissioner of Revenue Services of the State of Connecticut,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF OF *AMICI CURIAE* RICHARD G. SMITH, III, ERIC CALHOUN AND BARBARA R. EVANS, TRUSTEES UNDER VARIOUS *INTER VIVOS* TRUSTS AND PIEDMONT FINANCIAL COMPANY, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether Connecticut's tax on the undistributed income of "resident" *inter vivos* trusts violates:

a. the dormant or negative Commerce Clause because such a trust does not have a substantial nexus with the State of Connecticut and the tax is neither fairly apportioned nor fairly related to benefits provided by the State of Connecticut; and

b. the Due Process Clause because there is no definite link or minimum connection between such a trust and the State of Connecticut and the tax is not rationally related to benefits and protections received by the trust or its beneficiaries from the State of Connecticut.

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THE INTERESTS OF THE AMICI CURIAE

This brief is submitted in support of the Petition for a Writ of Certiorari. All parties have consented to the filing of this brief, and their written consents accompany this brief.

The amici are:[1]

Richard G. Smith III, Trustee of two *inter vivos* trusts established on December 20, 1935 by H. Smith Richardson, one for the primary benefit of Grace R. Stetson and the other for the primary benefit of Stuart S. Daly.

Eric C. Calhoun, Trustee of an *inter vivos* trust established on February 21, 1977, by John P. Richardson for the primary benefit of Wrenn B. Richardson.

Barbara R. Evans, Co-Trustee (with Richard G. Smith III) of an *inter vivos* trust established on December 28, 1934 by Grace Jones Richardson for the primary benefit of John Page Richardson.

Barbara R. Evans, Trustee of an *inter vivos* trust established on December 20, 1935 by H. Smith Richardson for the primary benefit of John Page Richardson.

Piedmont Financial Company, Inc., a New York corporation with its principal place of business in Greensboro, NC.

The undistributed income of the four *inter vivos* trusts identified above has been claimed to be subject to taxation by the Commissioner of Revenue Services of the State of Connecticut for years commencing in 1993 on the ground that each is a "resident" trust within the meaning of Conn. Gen. Stat. § 12-701(a)(4)(D). Tax appeals were filed on behalf of each of the trusts which appeals are pending in the Connecticut Superior Court. These tax appeals have been stayed by agreement of the parties pending this court's final determination of this case. Piedmont Financial Company, Inc. provides

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1. Counsel for these *amici* authored this brief in whole. No party made any monetary contribution to the preparation or submission of this brief.

investment management and administrative services to the trustees of each of the above referenced trusts.

SUMMARY OF ARGUMENT

The imposition of Connecticut income tax on the undistributed income of an *inter vivos* trust classified as a "resident" trust based solely upon the settlor's residence pursuant to Conn. Gen. Stat. § 12-701(a)(4)(D) violates the dormant Commerce Clause and the Due Process Clause when the trustee, assets and administration of the trust have been continuously located outside the State. In this case the parties to the *inter vivos* trust did not seek or obtain any judicial intervention. Even if they had, it is likely that the Connecticut Probate Court would have lacked subject matter jurisdiction and the Connecticut Superior Court would have lacked *in personam* jurisdiction to provide any relief. As a result, there were fewer benefits and protections provided by Connecticut than by the state(s) wherein the trustee and trust assets have been located. Due to the absence of benefits and protections the Connecticut tax is not fairly related to the services provided by the State.

There is no substantial nexus or even minimum connection between the State of Connecticut and an *inter vivos* trust based upon the residence of a settlor because the settlor might have executed the trust agreement in another state; intended, expressly or otherwise, that another state's law govern the trust; or resided for many years outside the State of Connecticut after creating the trust.

Calculation of the Connecticut undistributed income of a "resident" *inter vivos* trust in accordance with the 1993 amendment to the Connecticut tax statute results in an unfair apportionment and an irrational relationship between the undistributed income subject to taxation and the State of Connecticut. The statute does not require that the income subject to taxation be payable — either currently or eventually — to a Connecticut beneficiary. As a result, an income tax is due when there is at least one Connecticut noncontingent beneficiary even

when that beneficiary's right to receive income is withheld — either based upon a trustee's power or obligation to accumulate or the trust agreement providing that all capital gains are distributable to nonresident remaindermen. There is also unfair apportionment when the Connecticut noncontingent beneficiaries are entitled to a disproportionately smaller portion of the income than their *per capita* numbers would justify. Finally, an apportionment based upon the vague distinction between noncontingent or contingent interests is unfair because it is semantic; lacks substantive meaning; and is difficult if not impossible to discern with accuracy.

In rejecting the constitutional challenge to state taxation of the undistributed income of a "resident" *inter vivos* trust, the court below: (1) relied upon decisions in California and the District of Columbia which involved **testamentary** trusts wherein the challenge was based solely upon the Due Process Clause; (2) rejected a holding of this Court on the ground that it is no longer "good law"; and (3) adopted a holding which conflicts with holdings in New York, New Jersey and Michigan, each of which states has sustained constitutional challenges to substantially identical tax statutes.

ARGUMENT

I. CONNECTICUT LAW RELATING TO TAXATION AND JUDICIAL ADMINISTRATION OF *INTER VIVOS* TRUSTS[2]

A. The Connecticut Tax Statute

1. Sole Criterion For Determination Of Whether *Inter Vivos* Trust Is "Resident."

Conn. Gen. Stat. § 12-701(a)(4)(D) defines as a "resident" *inter vivos* trust one which was created by a person who was a resident of Connecticut at the time property was transferred to the trust (or, if a revocable trust, at the time the trust became irrevocable). Under this statute it is of no consequence whether

2. The *amici* concur with Petitioner's arguments concerning testamentary trusts. They will focus herein on *inter vivos* trusts.

the property transfer to the trust took place last year, 44 years ago or 64 years ago.[3] Nor is it of any consequence whether the settlor continued to reside in Connecticut thereafter; whether the trust was executed in Connecticut; or whether the trust agreement provides for a choice of law other than Connecticut.

When the statute was first enacted in 1991 (1991 June Spec. Sess. Public Act No. 91-3 § 52(a)(4)), it provided for an exemption from taxation of resident *inter vivos* trusts if: (a) all the trustees are nonresidents of Connecticut; (b) the entire corpus of the trust is located outside Connecticut; and (c) all income and gains of the trust are derived from or connected with sources outside Connecticut. As a result of this exemption, an *inter vivos* trust which satisfied the sole criterion of a "resident" trust would nevertheless be exempt from taxation of its undistributed income if the three requirements of the exemption were satisfied. Had this exemption continued, the *amici* would not be asserting the claims contained herein.

Effective as to taxable years commencing on or after January 1, 1993, the foregoing exemption was deleted. (May Spec. Sess. Public Act No. 92-17 §§ 11 and 59.) In lieu of this exemption, "Connecticut taxable income" was defined as that portion of interest, dividends and capital gains determined by application of a fraction, the numerator of which is the number of resident noncontingent beneficiaries and the denominator of which is the total number of noncontingent beneficiaries.

As amended the tax statute would purport to be applicable to many *inter vivos* trusts with little or no connection with Connecticut including, for example, the following: an irrevocable trust created and funded by a Connecticut resident in 1935 who left the State in the following year never to return thereafter in which the trustee, assets and administration of the trust have been continuously located outside the State and which

3. The *inter vivos* trust considered by the court below was created in 1955. Two of the *inter vivos* trusts administered by the undersigned amici were created in 1935 and one in 1934.

trust had at least one noncontingent beneficiary who happened to reside in Connecticut during the tax year in question — even though, under the terms of the trust agreement, that noncontingent beneficiary(ies) could not under any circumstances ever become entitled to any portion of the undistributed income subject to the tax.

2. The Extent Of The Undistributed Income Of A Resident Trust Subject To Connecticut's Tax

If a trust satisfies the single-pronged test of residency, then all of its undistributed income is subject to taxation regardless of whether its source is out of state. In the (fairly typical) event that all of the undistributed income is derived from investment, or intangible, property (e.g., interest, dividends and capital gains) held by the trust, the income is taxed without credit for any income tax paid to the state(s) where the investments are located.[4] Conn. Gen. Stat. § 12-704. In contrast, if a trust is classified as nonresident, then it is taxed only on Connecticut source income, e.g., income from real or tangible personal property or from trades or businesses located in Connecticut. Because it is fairly atypical for trusts to receive this type of income, the resolution of the "resident" status of an *inter vivos* trust normally has the consequence of determining that either all or none of the undistributed income is subject to taxation. Hence, the resolution of this issue is of critical importance.

It is important to understand that the only income of a trust which is in controversy in this case is *un*distributed income. To

4. This would result in double taxation if the trustee were located in a jurisdiction such as California; *McCulloch v. Franchise Tax Bd.*, 61 Cal. 2d 186, 390 P.2d 412 (1964) (*en banc*), *appeal dismissed*, 379 U.S. 133 (1964); or triple taxation if the beneficiary resided in a jurisdiction such as Virginia. *Guaranty Trust Co. v. Virginia*, 305 U.S. 19 (1938). For other examples of multiple taxation, see Fogel, *What Have You Done For Me Lately? Constitutional Limitations On State Taxation of Trusts*, 32 U. Rich. L. Rev. 165, 213-14 (1998). It is not the purpose of the *amici* to repeat the Petitioner's forceful argument relating to the multiple taxation of "resident" trusts. The point being made here is that the Connecticut tax is not fairly apportioned.

the extent that a trust distributes income, it is entitled to a deduction and the beneficiary, not the trust, is subject to taxation. This is important because the current law apportions the exemption from taxation based upon the residences of noncontingent beneficiaries regardless of their: (a) present right to control or receive either principal or income; (b) relative share of principal or income *vis a vis* nonresident beneficiaries; and (c) status as beneficiaries of income or principal. It is completely possible, therefore, that the Connecticut noncontingent beneficiaries are not entitled to any portion of the undistributed income which is subject to the tax — either in the tax year in question or in any year thereafter.

Assume, for example, a Connecticut resident created an *inter vivos* trust with income to A, a Connecticut resident for his life, to be accumulated until age 25 and distributed annually thereafter until his death; upon A's death, all principal and any undistributed accumulated income are distributable to B, a New York resident. Assume that the trustee was a New York resident and that all assets and trust administration occurred in New York. If the taxable year occurred after A became 25 years old, the income would be distributed to A and taxable to him, not the trust. If the taxable year occurred before A became 25 years old, one-half of the undistributed income would be subject to Connecticut's tax due to A's status as a noncontingent beneficiary — even though A would not be entitled to receive or control any portion of the income in that year[5]. If A died

5. In the case of the *Adolfsson inter vivos* trust considered by the Connecticut Supreme Court, the sole income beneficiary had "no present right or control over the portion of the trusts that were generating income subject to Connecticut's tax. In each case, Connecticut only assessed an income tax upon realized capital gains and accumulated income that were not distributed to any beneficiary in 1993." Pet. App. 6a, n.8. The Connecticut residence of this noncontingent beneficiary was the "critical link" upon which the court sustained the constitutionality of the tax. Pet. App. 34a. Yet, that beneficiary had no right to the undistributed income in the tax year in question. And, if she dies prior

(Cont'd)

before his 25th birthday, he would never be entitled to receive or control the undistributed income for the tax year in question. Under these circumstances, the connection between Connecticut and A would be trivial or nonexistent depending upon the taxable year.

The burden of this income tax falls unfairly upon the shoulders of the New York resident who receives no benefits or protections from the State of Connecticut. The connection between Connecticut and the settlor may be even more remote than the connection between Connecticut and A. For example, as in the case of several of the trusts administered by the *amici*, the settlor may have created and funded the trust decades ago and left the State. Or the trust agreement of the Connecticut settlor might have been executed in another state, or if executed in Connecticut, it might have contained a choice of law provision selecting the application of another state's law.

Basing the exemption from income taxation of *inter vivos* trusts upon a head count of noncontingent beneficiaries can produce other bizarre results. For example, six Connecticut noncontingent beneficiaries might be entitled to an aggregate twenty percent of the trust's undistributed income while three New York noncontingent beneficiaries might be entitled to an aggregate of eighty percent of the trust's undistributed income. In this event, two-thirds of the undistributed income would be subject to Connecticut's tax even though they had only a one-fifth share of the income taxed.

Another example of the unfair burden of the tax is a trust, the assets of which consist of growth stocks with low income yields. Assume that the trust provides for the eventual distribution of principal, including capital gains[6], to nonresident

(Cont'd)
to 2008 (when she becomes 48 years old), she will never receive this undistributed income and it is currently unascertainable whether any Connecticut resident will eventually receive it.

6. Capital gains would ordinarily be considered as principal for the purpose of trust accounting. They are considered income under the Connecticut tax.

beneficiaries with current distribution of income (relatively minor dividend income) to Connecticut beneficiaries. Although the nonresidents will receive all the capital gains under the terms of the trust agreement, these capital gains are treated as "income" for tax purposes and are taxed to the extent that there are Connecticut income beneficiaries despite the fact that none of these beneficiaries will ever receive the capital gains. Again, the burden of Connecticut's tax unfairly falls upon nonresidents despite the absence of any connection between them and the State of Connecticut.

3. The Uncertainty Inherent In The Computation Of The Connecticut Income Of A Resident *Inter Vivos* Trust Subject To Taxation

The 1993 amendment to the Connecticut tax statute has created uncertainty in the proper computation of the Connecticut income of a "resident" *inter vivos* trust which is subject to taxation. The determination of which beneficiary is "noncontingent" depends upon whether that person's beneficial interest in the trust is "subject to a condition precedent." Conn. Gen. Stat. § 12-701(a)(4). Subtle changes in the language of a trust agreement can change a contingent remainder into a vested remainder or vice versa. The distinction between a vested interest and a contingent interest often exalts form over substance[7] and has confused experienced lawyers as well as judges. *Restatement of the Law of Property* § 157, Note on Terminology (1936).

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7. See, for example, Bergin and Haskell, *Preface To Estates In Land and Future Interests* (2d ed.) (Foundation Press, 1984), p.82; *White, Trustee v. Smith*, 87 Conn. 663, 673, 89 A.272 (1914) (" . . . 'Thus on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, the remainder to such of his children as survive him, the remainder is contingent.' ") For example, if A were a Connecticut resident and had two children, each New York residents, Connecticut would tax one-third of the income in the first hypothetical and all of the income in the second. The only difference is semantic but it changes the fraction for determining Connecticut income from 1/3 to 1/1.

> It is often difficult to determine whether a given remainder is vested subject to complete defeasance or is contingent. The **form** of the limitation is of primary importance in solving the difficulty.

Howard, Trustee v. Batchelder, 143 Conn. 328, 334, 122 A.2d 307 (1956) (emphasis added).

The difficulty of achieving an accurate legal construction of the interest is compounded by the fact that owing to the idiomatic nature of language employed by draftsmen in describing future interests, "precedents are usually inconclusive." *Hartford National Bank and Trust Company v. Birge*, 159 Conn. 35, 42, 266 A.2d 373 (1970). As a result of basing the exemption on the accuracy of the determination of whether a beneficiary's interest as "noncontingent," an unreasonable burden has been placed upon fiduciaries, as well as the Commissioner of Revenue Services. If a fiduciary were to err in classifying a Connecticut beneficiary's interest as contingent, it might be liable to the State for understating the Connecticut income of a resident trust. If the fiduciary were to err in classifying a nonresident beneficiary's interest as contingent, it might be liable to the beneficiaries for overstating the Connecticut income of a resident trust.

B. The General Lack Of Judicial Administration Of "Resident" *Inter Vivos* Trusts in Connecticut

Much of the justification of the Connecticut Supreme Court for the constitutionality of taxing "resident" *inter vivos* trusts is based upon the so-called "protections and benefits" afforded by Connecticut. Pet. App. 35a-38a. When the Connecticut Supreme Court acknowledged that the taxation of "resident" *inter vivos* trusts is a "closer case than that with respect to testamentary trusts" (Pet. App. 34a) and that the connection between an *inter vivos* trust and the State is "more attenuated than in the case of a testamentary trust" (Pet. App. 35a), it implicitly recognized that, in reality, there are seldom any more protections and benefits for *inter vivos* trusts than for ordinary contracts.

There are no more formal requirements for the execution of such a trust than there are for contracts. At common law writings were not required. 1 Scott, *Trusts* (4th ed. 1989) § 39. Statutes of Frauds generally require writings only for trusts relating to real property. *Id.* § 40. Conn. Gen. Stat. § 52-550(a)(4). There are no more substantive requirements for mental capacity than there are for contracts. There are certainly no alternative provisions for the disposition of assets, such as laws of intestate succession. The *inter vivos* trust is not admitted to probate, and frequently never involves any type of court intervention. In fact, the ability to seek court intervention in Connecticut is significantly circumscribed so that even when it might be desirable, it is not attainable.

Consider the case of a "resident" *inter vivos* trust which had been covered by the 1991 exemption from taxation, i.e. where one or more noncontingent beneficiaries reside in Connecticut but: (a) the trustee is a nonresident or, if a corporation, does not maintain a place of business in Connecticut; (b) the assets of the trust are not situated or administered in Connecticut; and (c) the settlor does not currently reside in Connecticut or, if deceased, did not reside in Connecticut immediately prior to death. In such a situation the Connecticut Probate Court would lack subject matter jurisdiction to require a fiduciary's accounting or even to receive and approve such an accounting submitted by the fiduciary voluntarily. Conn. Gen. Stat. § 45a-175. It would lack subject matter jurisdiction to construe the meaning or effect of the trust instrument. Conn. Gen. Stat. § 45a-98. It would lack subject matter jurisdiction to terminate the trust. Conn. Gen. Stat. § 45a-484(d). The Superior Court's concurrent subject matter jurisdiction to construe a trust, require an accounting or discharge or replace a fiduciary would be dependent upon attaining *in personam* jurisdiction over the defendant(s) by serving the fiduciary properly within the State of Connecticut or through long-arm jurisdiction based upon an act committed within the State. Conn. Gen. Stat. §§ 52-59b and 33-929(f).

Thus, even if the trustee voluntarily sought to file an accounting for the Probate Court's approval, it could not do so. The Probate Court could not require such an accounting at the request of the Connecticut beneficiary. The Probate Court could not construe the trust agreement even if all parties agreed to the same. The Probate Court could not remove the trustee for cause or even appoint a successor with the consent of the parties.

II. CONSTITUTIONAL LAW RELATING TO STATE TAXATION OF *INTER VIVOS* TRUSTS

A. Connecticut Supreme Court Decision

In its ambitious undertaking to consider two separate challenges to the constitutionality of Connecticut's income taxation of four testamentary trusts and one *inter vivos* trust, the Connecticut Supreme Court devoted the great majority of its opinion to the testamentary trusts and the Due Process argument. As a result, too little attention was paid to the *inter vivos* trust and the dormant Commerce Clause argument.

1. Due Process Analysis

In its treatment of the single *inter vivos* trust before it, the Connecticut Supreme Court relied upon only one state court decision, *McCulloch v. Franchise Tax Board, supra*, which it described as a "closely analogous case" (Pet. App. 35a). In fact, *McCulloch* involved a testamentary trust. The beneficiary who received the income subject to taxation was both a co-trustee and a resident of the taxing state. *McCulloch, supra* at 188. The testator's will was admitted to probate in the taxing state and the administration of the testamentary trust was subject to the courts of the taxing state. *Id.* Thus, there are at least four distinguishing characteristics of *McCulloch*: (1) it involves a testamentary, not an *inter vivos*, trust; (2) one of the co-trustees, also a beneficiary, resided in the taxing state; (3) the beneficiary who resided in the taxing state actually received the income subject to the tax; and (4) the courts of the taxing state supervised the administration of the trust.

The remainder of the Connecticut Supreme Court's analysis of the Due Process clause relating to Connecticut's taxation of the *inter vivos* trust is devoted to its conclusion that this Court's holding in *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929) is no longer "good law." Pet. App. 34a. One of the principal authorities relied upon in support of this conclusion is a treatise[8] (Pet. App. 37a), the analysis of which itself has been criticized. *Fogel, supra*, 32 U. Rich. L. Rev. at 182-83. In any event it was inappropriate for the Connecticut Supreme Court to anticipate whether this Court would continue to follow *Safe Deposit & Trust Co.* today. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

In its consideration of the Due Process challenge to Connecticut's taxation of the *testamentary* trusts, the Connecticut Supreme Court relied most heavily upon *District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. App. 1997) Pet. App. 30a-31a. The District of Columbia Court of Appeals expressly stated that it was not passing upon the constitutionality of a state tax on *inter vivos* trusts based solely upon the residence of the settlor. *District of Columbia*, 689 A.2d at 547, n.11. In doing so, it hinted that such a tax would be unconstitutional. *Id.* ("[T]he nexus between the trust and the District is arguably more attenuated, since the trust was not created by probate of the decedent's will in the District's courts. An irrevocable inter vivos trust does not owe its existence to the laws and courts of the District. . . . In some cases District courts may not even have principal supervisory authority over such an inter vivos trust.")

2. Dormant Commerce Clause Analysis

The Connecticut Supreme Court does not cite any state court authority rejecting a Commerce Clause challenge[9] upon

8. 2 J. Hellerstein & W. Hellerstein, *State Taxation* (1992) ¶ 20.09 [2], pp.20-68.

9. The Petition (p.15) states that the Connecticut Supreme Court followed *District of Columbia v. Chase Manhattan Bank, supra*, which, (Cont'd)

state income taxation of a trust — either testamentary or *inter vivos* — and the *amici* are unaware of the existence of any such precedent. To this extent then, the opinion below is one of first impression. In rejecting the Commerce Clause challenge, the Connecticut Supreme Court relied upon this Court's opinions in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Its analysis of the challenge was too restricted and considered only that portion of the argument relating to the trusts' exposure to multiple taxation and the likely effect of discriminating against interstate commerce.

B. The Connecticut Tax On The *Inter Vivos* Trust Violates The Dormant Commerce Clause

At least three of this Court's four prerequisites[10] for a state tax surviving a dormant Commerce Clause challenge cannot be satisfied in this case.

1. There Is No Substantial Nexus Between The "Resident" *Inter Vivos* Trust And The State Of Connecticut

Under the Connecticut tax statute the sole criterion of residency of the trust is whether or not the settlor was a Connecticut resident when the trust was created and funded. The residence of the trust rises or falls with the residence of the settlor only. The residences of the beneficiaries are relevant only to the calculation of the income which is subject to taxation. The residence of any particular beneficiary is subject to change

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(Cont'd)
it states, also rejected "a Due Process and Commerce Clause challenge" against a state's taxation of a trust. Although it is true that the court below relied upon this case in its Due Process analysis (Pet. App. 30a-31a), the District of Columbia Court of Appeals did *not* consider a Commerce Clause challenge. *District of Columbia*, 689 A.2d at 542, n.7.

10. *Quill Corp.*, 504 U.S. at 310; *Complete Auto Transit, Inc.*, 430 U.S. at 279.

and no Connecticut settlor is capable of the prescience required to ascertain residences of beneficiaries in future generations.

The settlor's residence as of the time of funding an *inter vivos* trust has no relevance to a tax imposed on the trust's undistributed income decades later. In this case, the settlor established the *inter vivos* trust in 1955 (Pet. App. 5a), and died many years prior to 1993 when the Connecticut tax statute took its present form. The settlor of this trust did not and could not have satisfied even the lesser Due Process requirement of "purposeful direction" of his activities in Connecticut during the tax year in question. *Quill Corp.*, 504 U.S. at 308. And, being deceased, he could not satisfy the Commerce Clause requirement of "physical presence" during the tax year in question. *Id.*, 317; *National Geographic Society v. California Bd. Of Equalization*, 430 Conn. 551, 559 (1977); *National Bellas Hess, Inc. v. Illinois Rev. Dept.*, 386 U.S. 753, 758 (1967).

2. The Connecticut Tax Is Not Fairly Apportioned

The extent of the income of a "resident" *inter vivos* trust subject to taxation in Connecticut is dependent upon a head count of noncontingent beneficiaries residing in Connecticut as compared with the universe of noncontingent beneficiaries. The determination of the extent of income subject to the Connecticut tax purely based upon this proportion of noncontingent beneficiaries does not result in a fair apportionment because:

a. The tax statute does not require that the trust income subject to taxation be payable to the noncontingent beneficiary. As a result, the Connecticut residence of a noncontingent income beneficiary who is not currently entitled to receive income (e.g. by virtue of either the trustee's discretionary power or his obligation to accumulate income) would cause taxation of the trust's income.

b. The income tax includes capital gains which trust agreements would classify as principal rather than income. Hence, a noncontingent income beneficiary residing in Connecticut would cause some portion of the capital gain to be

taxed in Connecticut despite the fact that the Connecticut income beneficiary may not ever be entitled to receive any portion of the capital gain being taxed. As a result, the burden of the tax would fall upon the nonresident, noncontingent remainderman.

c. The income tax treats all noncontingent beneficiaries as equal and interchangeable despite the fact that trust agreements may provide that some are entitled to a greater portion of income and/or principal than others. To the extent that a Connecticut noncontingent beneficiary is, under the trust agreement, entitled to a lesser portion of income and/or principal than a nonresident, noncontingent beneficiary, the tax is not fairly apportioned.

d. The Connecticut income of a trust subject to taxation is based upon an apportionment of "noncontingent" beneficiaries, the accurate determination of whom is difficult if not impossible for fiduciaries and tax officials and, even if done accurately, often leads to whimsical results. To the extent that the Connecticut income of a trust is dependent upon this determination, it is not fairly apportioned.

Separate and apart from these disparities, as stated in the Petition, the Connecticut tax does not provide for a credit for taxes imposed on the intangible income of the trust by another state(s) which might base its tax upon the residence of the trustee or the beneficiaries.

3. The Connecticut Tax Is Not Fairly Related To The Services Provided By The State

The opinion below states that the trustee did not maintain any presence in Connecticut during the tax year in question; that the assets of all trusts consisted of intangible investment property located out of state; that no trust received any Connecticut source income; that "no aspect of trust administration was conducted in Connecticut in 1993, and except for this proceeding [the tax case] and the probate court proceedings delineated later in this opinion, the plaintiff, as trustee, has not been the subject of any judicial or administrative proceeding in any Connecticut forum." Pet. App. 5a. The opinion

refers to certain probate proceedings for the four testamentary trusts, but no such proceeding for the *inter vivos* trust. The absence of any judicial intervention in the administration of an *inter vivos* trust is not unusual. In fact if the settlor did not reside in Connecticut immediately prior to his death, the Connecticut Probate Court would lack subject matter jurisdiction to require or even to entertain a judicial accounting. Therefore, even if the income beneficiary had sought its protection, the Probate Court lacked the ability to provide it.

The benefits and protections described by the Connecticut Supreme Court are illusory. It is meaningless to state that the income beneficiary "enjoyed all the protections and benefits afforded to other domiciliaries" (Pet. App. 35a) when there are no such protections and benefits relating to the trust. In other words, the fact that Connecticut might provide, for example, police and fire protection to the income beneficiary and other domiciliaries does not mean that Connecticut would or could redress a wrong relating either to the income beneficiary's interest in the trust or to other domiciliaries' interests in contracts or property beyond its jurisdiction. It is fanciful to state that the income beneficiary's right to "eventual" receipt and enjoyment of the accumulated income will be "protected" by Connecticut as long as she remained a Connecticut resident. Pet. App. 35a. The protection available in the forum where the trustee and the trust assets are located is far superior to that afforded by Connecticut where its courts' jurisdiction would be problematical at best.

C. The Connecticut Tax On The *Inter Vivos* Trust Violates The Due Process Clause

1. There Is No Definite Link Or Minimum Connection Between The State of Connecticut And The "Resident" *Inter Vivos* Trust

Although the Due Process focus is different from the Commerce Clause focus; *Quill Corp.*, *supra* at 307-08; nevertheless the "resident" *inter vivos* trust has no definite link or minimum connection with the State of Connecticut. Just as

it would offend traditional notions of fair play and substantial justice to impose *in personam* jurisdiction over an *inter vivos* trust merely because the settlor resided in Connecticut when it was created and funded in 1955; *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); it offends these same notions to impose a state tax on such a trust. Unlike the mail order houses which "purposefully directed" marketing toward the taxing state, there is no reason to believe that a settlor of an *inter vivos* trust directs any attention toward the state of his residence when he creates and funds the trust. The settlor may have executed the trust agreement in another state or he may have selected the law of another state by express provision in the agreement.

The domicile of a settlor of an *inter vivos* trust is only one of eight factors[11] considered by courts in determining the appropriate law to be applied in a conflicts of law analysis. Its importance is not as great as the intention of the settlor or the location of the trust assets. 6 Scott, *Trusts* (4th ed.) § 555, pp.118-19; *Stetson v. Morgan Guaranty Trust Company of New York*, 22 Conn. Sup. 158, 160, 164 A.2d 239 (Super. Ct., Fairfield Co., Bogdanski, J. 1960).

When a settlor makes dispositive provisions in a trust agreement for the benefit of persons generations into the future, some of whom are unborn and unascertainable, he cannot possibly know or care about their residences. When a settlor names trustees in an *inter vivos* trust agreement, he cannot possibly know how long they will continue to reside in the state of their residence or whether they will ever wish to or be able to invoke the jurisdiction of the laws of his own state of residence.

In *Mercantile-Safe Deposit & Trust Co. v. Murphy*, 15 N.Y.2d 579, 203 N.E.2d 490 (1964) the New York Court of

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11. The eight factors are: 1. settlor's domicile; 2. place of execution of trust agreement; 3. language of trust agreement; 4. location of trust property; 5. trustee's domicile; 6. beneficiary's domicile; 7. place of administration of trust; and 8. settlor's implied intention. 6 Scott, *supra* at § 555, p.117.

Appeals sustained a Due Process challenge to a state tax provision substantially the same as the Connecticut provision, defining as a "resident" trust one in which the settlor was domiciled in New York when the trust was created. New York Tax Law § 605(b)(3)(C). The *Mercantile-Safe Deposit Co.* case is one of the few cases dealing with state income taxation of *inter vivos* trusts, as opposed to testamentary trusts. The trust in question was created by a New York resident who was also the income beneficiary. Upon his death, his spouse, also a New York resident, was given the right to the income of the trust subject, however, to the trustee's right to accumulate which was exercised. The trustee, the intangible assets and the administration of the trust were all located in Maryland. On these facts, the New York Court of Appeals found a violation of the Due Process clause because the surviving income beneficiary (the spouse residing in New York) had no present right to the control or possession of the income of the trust subject to taxation. *Id.* 581.

The instant case is similar to *Mercantile Safe-Deposit Co.* but provides a more compelling case for sustaining a Due Process challenge. Here, as in *Mercantile-Safe Deposit Co.*, the sole income beneficiary had no present right or control over the portion of the trusts that were generating income subject to Connecticut's tax. Pet. App. 6a, n.8. Here, unlike *Mercantile-Safe Deposit Co.*, the settlor himself was not an income beneficiary.

Other state court cases sustaining Due Process challenges to state income taxation of *inter vivos* trusts are *Blue v. Dept. of Treasury*, 185 Mich. App. 406, 462 N.W.2d 762 (1990) and *Potter v. Taxation Division Director*, 5 N.J. Tax 399 (1983). Both Michigan and New Jersey defined "resident" trusts in the same manner as Connecticut and New York. In the *Blue* case, the state of residence of the six residuary beneficiaries was not indicated. The court focused upon the in-state residence of the settlor and found that it afforded insufficient contact with the taxing authority. *Blue*, 185 Mich. App. at 410. In *Potter*, the

income beneficiaries resided out of state but certain contingent beneficiaries resided in state. The court found that the in-state residence of the contingent beneficiaries was not material because they had no right to the undistributed income subject to taxation. The same principle is applicable with equal force to a noncontingent beneficiary who has no right to control or receive income by virtue of the trustee's power or obligation to accumulate income.

The Connecticut Supreme Court expressly disagreed with the reasoning of the *Mercantile-Safe Deposit Co.*, *Blue* and *Potter* cases. Pet. App. 36a, n.25. The authority upon which it did so was *McCulloch, supra*, involving a testamentary trust, as well as its prediction that this Court's holding in *Safe Deposit & Trust Co., supra*, is not "good law."

2. There Is No Rational Relationship Between The Connecticut Tax And Any Benefits Or Protections Afforded By The State of Connecticut To The "Resident" *Inter Vivos* Trust

Like many other *inter vivos* trusts, the *inter vivos* trust considered below never sought — either through the settlor, the trustee or any of the beneficiaries — the aid of the Connecticut judicial system. Pet. App. 5a. And, if the settlor did not reside in Connecticut immediately before his death, none of the parties to the trust, including the resident beneficiary, could have obtained the aid of the Connecticut courts because the Probate Court would have lacked subject matter jurisdiction and the Superior Court *in personam* jurisdiction.

The Connecticut Supreme Court rejected the Due Process challenge, finding that during the tax year in question the income beneficiary "enjoyed all of the protections and benefits afforded to other domiciliaries." Pet. App. 35a. The simple truth is that there were no benefits and protections to this *inter vivos* trust provided by Connecticut; in fact, there were more benefits and protections available in New York than in Connecticut.

> The state cannot create hypothetical legal protections through a classification scheme whose validity is

> constitutionally suspect and attempt to support the constitutionality of the statute by these hypothetical legal protections.

Blue v. Dept. of Treasury, supra, 185 Mich. App. at 411.

The Connecticut Supreme Court is the first state appellate court to have rejected a constitutional challenge to state taxation of undistributed income of an *inter vivos* trust. The language of the Connecticut tax statute defining a "resident" trust is substantially identical to the New York, New Jersey and Michigan statutes considered in the three cases described above wherein constitutional challenges were sustained. As one of the commentators has stated, this statutory definition of a "resident" trust

> . . . is constitutionally flawed and fails to account for changing events that occur during the existence of a trust. In its place, the states may adopt a system that bases the state taxation of trusts on current connections between the state and the trust, such as the residence of the trustees or beneficiaries.

Fogel, supra, 32 U. Rich. L. Rev. at 230.

Connecticut stands alone in rejecting the constitutional challenge to state taxation of undistributed income of a "resident" *inter vivos* trust. The decision below is erroneous and conflicts with this Court's decisions, as well as the decisions of the highest courts of other states. This Court should grant the Petition in order to correct the error of the court below and to resolve the conflict which exists between the states.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE
Supreme Court of the United States

THE CHASE MANHATTAN BANK, *et al.*,
Petitioners,
v.
GENE GAVIN,
Commissioner of Revenue Services
of the State of Connecticut,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

BRIEF FOR *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, CALIFORNIA BANKERS ASSOCIATION, ILLINOIS BANKERS ASSOCIATION, MASSACHUSETTS BANKERS ASSOCIATION, MICHIGAN BANKERS ASSOCIATION, MISSOURI BANKERS ASSOCIATION, NEW YORK BANKERS ASSOCIATION, AND PENNSYLVANIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 99-366

THE CHASE MANHATTAN BANK, *et al.*,
Petitioners,

v.

GENE GAVIN,
Commissioner of Revenue Services
of the State of Connecticut,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

BRIEF FOR *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, CALIFORNIA BANKERS ASSOCIATION, ILLINOIS BANKERS ASSOCIATION, MASSACHUSETTS BANKERS ASSOCIATION, MICHIGAN BANKERS ASSOCIATION, MISSOURI BANKERS ASSOCIATION, NEW YORK BANKERS ASSOCIATION, AND PENNSYLVANIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE* [1]

The American Bankers Association is the principal national trade association of the banking industry in the United States. Its membership includes community, re-

[1] No counsel for any party had any role in authoring this brief, and no person other than *amici curiae* made any monetary contribution to its preparation or submission. Written consents of the petitioners and respondent have been obtained and filed with the Clerk of the Court.

gional, and money-center banks and holding companies, as well as savings associations, trust companies, and savings banks. These institutions, located in each of the 50 States and the District of Columbia, account for approximately 90 percent of assets in the domestic banking and thrift industry. In 1997, banks, thrifts, and trust companies administered more than a billion trust and estate accounts containing nearly $1.1 trillion of assets.[2]

The California Bankers Association is a non-profit trade association incorporated under the laws of California. The California Bankers Association represents virtually all of the more than 300 commercial banks and trust companies in California.

The Illinois Bankers Association represents more than 700 commercial and savings banks in Illinois, which together account for more than 90 percent of the banking assets in the State. A significant number (more than 200) of Illinois's commercial and savings banks engage in trust and fiduciary activities, and the Illinois Bankers Association maintains a strong commitment to representing them in legislative, regulatory, and judicial proceedings regarding matters of interest to them, including state and federal taxation.

The Massachusetts Bankers Association is comprised of more than 200 commercial, savings, and cooperative banks and savings and loan associations throughout the Commonwealth of Massachusetts, including all state and national banks with trust powers located in Massachusetts.

The Michigan Bankers Association is comprised of regional, community, and money-center banks located in

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[2] *See* Federal Financial Institutions Examination Council, *Trust Assets of Financial Institutions*, at Table A-2 (1997).

Michigan, including all banks with trust powers in the State.

The Missouri Bankers Association represents community commercial banks and thrifts, regional banks, and money-center banks located in Missouri, some of which have trust powers.

The New York Bankers Association is the principal trade association of the banking industry in New York State. It has more than 140 resident and nonresident member banks, consisting of both national and state-chartered banks and trust companies and including community, regional, and money-center banks. The New York Bankers Association's members include every commercial banking institution in New York State that has fiduciary powers pursuant to New York banking law. *See* N.Y. Banking Law § 100 (McKinney 1990).

The Pennsylvania Bankers Association is the statewide trade association representing commercial and savings institutions as well as trust companies. A significant number of the Pennsylvania Bankers Association's members maintain fiduciary authority and offer trust services to clients.

* * * *

The decision of the Supreme Court of Connecticut in this case raises two issues of profound concern to *amici*. *First*, it exacerbates the uncertainty and confusion regarding the contacts a State must have with a trust before it may constitutionally tax undistributed income of the trust. *Amici*'s members have fiduciary responsibility for administering millions of trusts throughout the country, many of which have contacts with more than one State. Clarification of the scope of a State's power to tax trust income is of utmost importance to the proper fulfillment of *amici*'s members' fiduciary duties.

Uncertainty regarding the scope of a State's power to tax trust income presents *amici*'s members with a Hobson's choice. Their fiduciary obligations require them to pay only taxes that are *lawfully* imposed on the trusts that they administer. Consequently, *amici*'s members must either (1) pay a tax of questionable constitutionality and potentially face personal liability for such payment if the tax is later struck down, or (2) refuse to pay the tax (or even file a return) and potentially face personal liability for interest and penalties if the tax is later sustained. This Court's guidance is needed to extricate banks, trust companies, and individual trustees from the untenable position in which the disagreement among state courts places them.

Wholly apart from the conflict that the Connecticut decision has sharpened over their obligation to file state tax returns, *amici* are disturbed by a second aspect of the Connecticut court's decision: under its holding, a State may tax *100 percent* of a resident trust's investment income from intangibles, without apportionment or credits for taxes paid to other States. Because trusts often are considered to be "resident" in several States simultaneously for state tax purposes (*e.g.*, where the trustee resides, where the beneficiaries reside, where the trust assets are located), the Connecticut ruling exposes multistate trusts to a substantial risk of multiple taxation, by permitting each of the States that can legitimately claim to be the trust's residence to tax all of the trust's intangible investment income without apportionment or credits. As a consequence, the Connecticut court's holding "exerts an inexorable hydraulic pressure" (*American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987)) on those who create and administer trusts to escape multiple taxation by confining their activities to a single State—in direct contradiction of first principles of this Court's Commerce Clause jurisprudence.

I. THIS COURT'S GUIDANCE IS NECESSARY TO RESOLVE THE CONFLICT AMONG STATE COURTS REGARDING THE CIRCUMSTANCES UNDER WHICH TRUSTS ARE SUBJECT TO STATE INCOME TAXATION.

The Connecticut Supreme Court's decision implicates two common and recurring fact patterns in which conflicting state-court rulings place trustees like *amici*'s members on the horns of a dilemma. The first problematic fact pattern arises when States like Connecticut claim an entitlement to tax undistributed income of testamentary trusts on the strength of no more than the testator's residence at the time of death. *See generally* Pet. 16 n.15 ("Twelve states and the District of Columbia have income tax statutes that tax trusts in a manner similar to Connecticut's.") (citing statutes). According to the Connecticut decision, trustees must file a tax return in such States and pay tax upon the trust's undistributed income—even if the trustee, the trust assets, and the trust administration are located outside the State, and all income subject to taxation is derived from sources outside the State. *See* Pet. App. 30a-33a; *accord District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. 1997); *First Nat'l Bank of Boston v. Harvey*, 16 A.2d 184 (Vt. 1940).

But a trustee that follows the teachings of the courts of Connecticut, the District of Columbia, and Vermont will be paying a tax that courts in Missouri, New Jersey, and New York have said may not constitutionally be imposed. For example, the Supreme Court of Missouri has held that Missouri may not constitutionally tax the undistributed income of a trust created by a Missouri resident decedent when the trustees, the beneficiaries, the trust property, and the trust administration were in Illinois. *See Swift v. Director of Revenue*, 727 S.W.2d 880 (Mo. 1987). In the Missouri court's view, "[a]n income tax is justified only when contemporary benefits and pro-

tections are provided the subject property or entity during the relevant taxing period." *Id.* at 882; *accord Pennoyer v. Taxation Div. Director*, 5 N.J. Tax 386 (1983); *Taylor v. State Tax Comm'n*, 445 N.Y.S.2d 648 (App. Div. 1981).

The second problematic fact pattern arises when an inter vivos trust is created by a resident of State A, one or more of the trust's beneficiaries reside in State A, but the trust is administered in State B, where the trustee and the trust's assets are located. This was the fact pattern in *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929), where this Court held that Virginia could not constitutionally impose a tax on the intangible property of an inter vivos trust, even though it was created by a Virginia resident and had a Virginia beneficiary, when the trustee and trust property were located in Maryland. Some state courts have therefore concluded that, even if the trust was created by a resident settlor and there are resident beneficiaries, a State may not impose a tax on an inter vivos trust's undistributed income. *See Mercantile-Safe Deposit & Trust Co. v. Murphy*, 203 N.E.2d 490 (N.Y. 1964); *see also Blue v. Department of Treasury*, 462 N.W.2d 762 (Mich. Ct. App. 1990) (Michigan may not tax undistributed income of irrevocable inter vivos trust created by a Michigan resident, when the trust is administered in Florida where the beneficiary, the trustee, and the income-producing trust assets are located); *Potter v. Taxation Div. Director*, 5 N.J. Tax 399 (1983) (New Jersey may not tax undistributed income of irrevocable inter vivos trust created by New Jersey domiciliary where trustee, beneficiaries, and assets are all located outside New Jersey).

One might think, then, that, on the strength of *Safe Deposit* and its progeny, *amici*'s members could safely decline to file income-tax returns for inter vivos trusts in

States of the settlor's or beneficiaries' residence, so long as the trustee and the trust property are located in other States. But members that do so act at their peril. The Connecticut Supreme Court has now declared that it is "not persuaded that . . . [*Safe Deposit*] . . . is still good law," Pet. App. 36a, and that it "disagree[s] . . . with the reasoning of those cases . . . in which courts have found the domicile of a beneficiary of an inter vivos trust insufficient for due process purposes," *id.* at 36a n.25. Moreover, the California Supreme Court has held that the presence of a beneficiary in California justified taxation of the undistributed income of even a trust created by a *non*resident. *See McCulloch v. Franchise Tax Bd.*, 390 P.2d 412 (Cal.) (en banc), *appeal dismissed*, 379 U.S. 133 (1964).

In short, the law in this area is uncertain at best and chaotic at worst. *See, e.g.*, M. Read Moore & Amy L. Sullivan, *State Income Taxation of Trusts: New Case Creates Uncertainty*, 24 Estate Planning 200 (June 1997) (discussing *District of Columbia v. Chase Manhattan Bank*, *supra*). Uncertainty in the law is particularly troublesome in this field: *amici*'s members are compelled to speculate about their obligation to file tax returns, knowing that a wrong guess may expose them to liability either for remitting taxes the trust was not required to pay or for failing to pay taxes that were properly due.[3] This Court alone can resolve the conflict among state courts, clarify the circumstances under which a State may compel a trust to pay tax on undistributed income, and permit trustees faithfully to discharge their fiduciary obligations.

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[3] Because most States' statutes of limitations do not begin to run until a taxpayer files a return, trustees' exposure to unpaid taxes, interest, and penalties could, in theory, be staggering.

II. REGIMES LIKE CONNECTICUT'S—UNDER WHICH A STATE TAXES THE ENTIRETY OF A TRUST'S INCOME EVEN WHEN, AS IN THIS CASE, OTHER STATES HAVE A LEGITIMATE CLAIM TO TAXATION OF THE SAME INCOME—DIRECTLY CHALLENGE SETTLED COMMERCE CLAUSE PRINCIPLES.

Whether or not Connecticut may tax the undistributed trust income at issue in this case, no one would doubt that New York (where the trustees resided, where the trust property was located, and where the trusts were administered) may do so. *See, e.g., Greenough v. Tax Assessors of Newport*, 331 U.S. 486 (1947); *Guaranty Trust Co. v. Virginia*, 305 U.S. 19 (1938); *Safe Deposit & Trust Co. v. Virginia, supra.* Accordingly, if this Court leaves undisturbed the Connecticut Supreme Court's determination that the Due Process Clause is no obstacle to Connecticut's taxing the undistributed income of one or more of the trusts at issue here, a second question of abiding concern to *amici* is presented. The concern stems from Connecticut's failure to make any accommodation for the fact that other States have an equal or greater entitlement to tax the trusts' intangible investment income. As a consequence, Connecticut's taxing scheme creates a substantial risk of multiple taxation of trusts that have contacts with more than one State. It thereby undermines our national common market, in direct contradiction of fundamental Commerce Clause principles.

To appreciate the nature and magnitude of the problem created by Connecticut's regime for taxing income of trusts, one may usefully compare it with state income taxation of individuals. States have traditionally used two alternative predicates to tax income (whether of individuals or trusts): residence and source. *See, e.g.*, American Law Institute, *Federal Income Tax Project: International Aspects of United States Income Taxation* 6 (1987).

Neither predicate offends due process. With respect to residence-based taxation, this Court has declared: "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation." *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312-13 (1937). With respect to source-based taxation, the Court has stated:

> That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement.

Shaffer v. Carter, 252 U.S. 37, 50-51 (1920). Accordingly, States generally tax residents (whether individuals or trusts) on all income wherever earned, *see* 2 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶¶ 20.04[2], 20.09[1] (3d ed. 1998), while taxing nonresidents on income from sources within the State, *see id.* ¶¶ 20.05[2], 20.09[1].

In the case of income earned outside a taxpayer's State of residence, the confluence of the two alternative predicates for taxation may lead to *multiple* taxation—*i.e.*, the same income may be subjected to source-based taxation by one State and residence-based taxation by another State. Without more, multiple taxation would plainly inhibit interstate commerce, thereby raising grave Commerce Clause problems. *See infra*, pp. 13-15. But States have generally recognized and addressed this problem. When both the State of residence and the State of source have a legitimate claim to tax income, the State of residence (implicitly acknowledging its inferior entitlement to tax)

ordinarily yields to the State of source to avoid double taxation. It does so by providing credits against income taxes for taxes paid to the State of source. Indeed, every State with a broad-based personal income tax provides a credit for taxes that their resident individuals and trusts pay to other States. *See* 2 Hellerstein & Hellerstein, *supra*, ¶¶ 20.04[2], 20.09[1], 20.10.

But the credit statutes of many of these States (including Connecticut) limit the credit to taxes paid on "income derived from sources" in other States. Conn. Gen. Stat. Ann. § 12-704(a) (West 1999 Supp.).[4] And, for purposes of these statutes, investment income from intangibles is usually deemed not to have a "source" in other States; thus, States with credit statutes like Connecticut's will deny a resident a credit for taxes paid to other States

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[4] In addition to Connecticut, these States include Arizona (Ariz. Rev. Stat. Ann. § 43-1071.A.1 (West 1998 Supp.)); Arkansas (Ark. Code Ann. § 26-51-504(a)(1) (Michie 1997)); California (Cal. Rev. & Tax. Code § 18001(a)(1) (West 1994)); Colorado (Colo. Rev. Stat. Ann. § 39-22-108 (West 1990)); Delaware (Del. Code Ann. tit. 30, § 1111(a) (1997)); District of Columbia (D.C. Code Ann. § 47-1806.4(a) (1997)); Idaho (Idaho Code § 63-3029(1) (1998 Supp.)); Louisiana (La. Rev. Stat. Ann. § 47:33 (West 1999 Supp.)); Maine (Me. Rev. Stat. Ann. tit. 36, § 5217-A (West 1998 Supp.)); Missouri (Mo. Ann. Stat. § 143.081 (West 1996)); Montana (Mont. Code Ann. § 15-30-124 (1997)); Nebraska (Neb. Rev. Stat. Ann. § 77-2730(1) (Michie 1995)); New York (N.Y. Tax Law § 620(a) (McKinney 1987)); North Carolina (N.C. Gen. Stat. §§ 105-151, 105-160.3 (1997)); North Dakota (N.D. Cent. Code § 57-38-04.2.a (1999 Supp.)); Oklahoma (Okla. Stat. Ann. tit. 68, § 2357(B)(1) (West 1999 Supp.)); Oregon (Or. Rev. Stat. § 316.082 (1998 Supp.)); South Carolina (S.C. Code Ann. § 12-6-3400 (1998 Supp.)); Utah (Utah Code Ann. §§ 59-10-106(1) (1996), 59-10-201 (1999 Supp.)); Vermont (Vt. Stat. Ann. tit. 32, § 5825 (1998 Supp.)); and West Virginia (W. Va. Code § 11-21-20(a) (1995)). *See also* Va. Code Ann. § 58.1-332 (Michie 1997) (limiting resident credit to "earned or business income," which would disallow a credit for income from intangibles). Because Tennessee's income tax is limited to investment income, it does not provide for a credit for taxes paid to other States on such income.

on investment income derived from intangibles. *See* Pet. App. 39a-40a; *see also In re Mallinckrodt*, DTA No. 807553, [1991-92 Transfer Binder] N.Y. State Tax Rep. (CCH) ¶ 400-670 (N.Y. Tax Appeals Tribunal Nov. 12, 1992) (denying New York resident credit for Missouri taxes imposed on intangible investment income received from Missouri trust because not "derived" from Missouri source within meaning of New York's credit statute).

In the context of income taxation of individuals, this refusal to grant a credit may be tolerable. States tax nonresidents only on income from sources within the State, and States generally do not consider intangible investment income earned by a nonresident as being derived from sources within the State. *See* 2 Hellerstein & Hellerstein, *supra*, ¶ 20.05[6]. Consequently, a State's failure to grant its individual residents a credit for taxes paid on intangible investment income to other States usually imposes no hardship on such taxpayers, because other States have not taxed such income. It is only in those rare instances in which an individual is deemed to be a resident of more than one State simultaneously—*e.g.*, because she has a domicile in one State while maintaining a substantial presence in another [5]—that the individual would face even the possibility of double taxation of her intangible investment income. And, at any rate, intangible investment income comprises a relatively modest portion of the earnings of most individuals.

Where income taxation of *trusts* is concerned, however, more serious problems arise. Whereas individual taxpay-

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[5] For example, if a taxpayer has her principal residence in New Jersey but commutes to New York, where she maintains a permanent place of abode, the taxpayer would be a resident of New Jersey, based on her domicile, *see* N.J. Stat. Ann. § 54A:1-2m (West 1986), and a resident of New York, based on the maintenance of a permanent place of abode in the State coupled with her presence in New York for more than 183 days, *see* N.Y. Tax Law § 605(b)(1)(B) (McKinney 1987).

ers almost invariably are considered to be resident in only one State at any given time, trusts frequently are considered to be resident in several States simultaneously: they may be considered to be resident where the trustee resides,[6] where the beneficiaries reside,[7] where the trust's assets are located,[8] or where a combination of these factors applies.[9] These States' claim to the residence of the trust may be equal to or greater than Connecticut's claim based on the domicile of the settlor or the testator. *See, e.g., Greenough, supra.* Moreover, because each of these States, like Connecticut, will be taxing the trust's income on a "residence" basis, they will subject the trust's undistributed investment income to tax regardless of its source. And they will often provide no credit for other States' taxes on such income: the income (being investment income from intangibles) was not "derived from sources" within those States. *See supra*, p. 10 n.4.

The resulting problem is obvious. For example, Connecticut's claim of an entitlement to tax 100 percent of a resident trust's undistributed investment income gives rise to double or triple or even quadruple taxation if other States likewise assert an entitlement to tax such income without providing a credit for taxes paid to other States or some form of apportionment. If a Connecticut resident

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[6] *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 43-1312, 43-1313 (West 1980); Ark. Code Ann. § 26-51-203 (Michie 1997); Cal. Rev. & Tax. Code § 17742 (West 1994).

[7] *See, e.g.*, Ga. Code Ann. § 48-7-22(a)(1)(C) (1995); N.C. Gen. Stat. § 105-160.2 (1997); Tenn. Code Ann. § 67-2-110 (1998).

[8] *See, e.g.*, Colo. Rev. Stat. Ann. § 39-22-103(10) (West 1998 Supp.); S.C. Code Ann. § 12-6-30(5) (1998 Supp.); Va. Code Ann. § 58.1-302 (Michie 1997).

[9] *See, e.g.*, Del. Code Ann. tit. 30, §§ 1136(a), 1140(a) (1997); Md. Code Ann., Tax-Gen. §§ 10-101(h)(1)(iii) (1997), 10-207(o) (1998 Supp.); Mass. Gen. Laws Ann. ch. 62, § 10(a) and (c) (West 1999 Supp.).

decedent established a testamentary trust with an Arizona resident trustee, who arranged for the trust to be administered in Virginia for the benefit of the trust's California resident beneficiaries, Connecticut, Arizona, Virginia, and California each would tax the trust on its undistributed investment income. *See supra*, p. 12 nn.6-9. Yet none of these States would provide a credit for the taxes paid on the same investment income to the other States. *See supra*, p. 10 n.4.[10]

These conflicting claims have a direct and pernicious impact on interstate commerce. Testators, settlors, and their advisers are induced to confine trust-related activities to a single jurisdiction in order to avoid the untoward tax consequences of crossing state lines. This balkanizing effect is illustrated by the advice offered by sophisticated trust-and-estate counsel, who urge that "the settlor must be advised of the tax consequences of selecting a person or trust company residing or situated out of state to serve as trustee of the proposed trust." Max Gutierrez, *Oops! The State Income Taxation of Multi-Jurisdictional Trusts*, 25th Annual Philip E. Heckerling Institute on Estate Planning ¶ 1204.1, at 12-19 (1991). Indeed, the court below agreed with petitioners' contention that, under the Connecticut statute, "testators will have an incentive to appoint only Connecticut trustees because appointing a trustee in another state 'necessarily subjects the testamen-

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[10] Connecticut does provide some relief: where it taxes a trust's undistributed investment income on the basis of a beneficiary's residence, it prorates the tax base by reference to the proportion of the beneficiaries that are state residents. *See* Conn. Gen. Stat. Ann. § 12-701(a)(4) (West 1999 Supp.). Some States that tax on the basis of the trustee's residence provide analogous relief by prorating the tax base by reference to the proportion of the trustees that are state residents. *See, e.g.*, Cal. Rev. & Tax Code § 17743 (West 1994). But such relief measures are limited in scope and inapplicable in the instant case.

tary trust to the risk of a second income tax in that State.'" Pet. App. 41a-42a.

Despite this risk of multiple taxation and its balkanizing effect, the Connecticut decision denies the existence of a Commerce Clause problem. *See id.* at 42a-44a. It thereby flies in the face of settled Commerce Clause doctrine: this Court has repeatedly and abundantly made clear that no State may tax 100 percent of a tax base to which other States may lay some legitimate claim. The logical underpinning for this rule is irrefutable: if a taxpayer is subject to tax in more than one State, permitting either State to tax the entire base without apportionment or a credit for taxes imposed by other States would expose the taxpayer to multiple taxation, which the Court has long condemned under the Commerce Clause. *See, e.g., Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987) (invalidating tax that exposed taxpayer to "multiple burden"); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939) (invalidating tax because it imposed "the risk of a multiple burden to which local commerce is not exposed"); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938) (invalidating tax that subjected interstate commerce "to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids").

Thus, in *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952), the Court rejected Ohio's contention—analogous to Connecticut's here—that, as Standard Oil's domicile, it was entitled to tax 100 percent of Standard Oil's personal property, even though other States had authority to tax at least a portion of such property:

> The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all the property by the state of the domicile. Otherwise there would be multiple taxation of inter-

> state operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations.

Id. at 384-85 (internal citation omitted). The Court has reiterated this principle, rejecting claims that domiciliary States may tax 100 percent of a taxpayer's income or property when other States have a right to tax such income or property. *See Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444 (1980) ("[t]axation by apportionment and taxation by allocation to a single situs are theoretically incommensurate"); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447 (1979) ("The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full.").

In short, the multiple tax burden to which Connecticut's taxing scheme exposes multistate trusts plainly offends the teachings of this Court's Commerce Clause cases: it "forecloses tax-neutral decisions," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331 (1977), and creates a competitive advantage for local over out-of-state trustees, *cf. South Central Bell Tel. Co. v. Alabama*, 119 S. Ct. 1180 (1999) (invalidating state tax favoring local over out-of-state corporations). This Court's review of the Connecticut decision is essential to reaffirm the fundamental Commerce Clause principle that, "if a taxpayer located in State A can demonstrate that it is taxable in State B, the taxpayer has a constitutional right to insist that State A attribute at least a portion of the taxpayer's overall tax base—whether it be property, income, or receipts—to State B." 1 Hellerstein & Hellerstein, *supra*, ¶ 8.02[1] at 8-10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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